LIBRARY
SUPREME COURT, U. S.

Office Supreme Court, U.S.
FILED
JUN 10 1964
JOHN F. DAVIS, CLERK

No. [redacted]

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

168

CHICAGO & EASTERN ILLINOIS RAILROAD CO., an Indiana corporation, et al.,

Petitioners,

vs.

PAUL J. KERN and IRVING M. LESCH,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO APPELLATE COURT OF ILLINOIS, FIRST DISTRICT

JAMES A. VELDE
JOHN K. NOTZ, JR.
33 South Clark Street
Chicago, Illinois 60603

PATRICK C. MULLEN
646 Chicago Road
Chicago Heights, Illinois
Counsel for Petitioners

Of Counsel
GARDNER, CARTON, DOUGLAS, CHILGREN & WAUD
33 South Clark Street
Chicago, Illinois 60603

June, 1964

The Scheffer Press, Inc.—ANdover 3-6850

INDEX

	PAGE
Citations to Opinions Below	1
Jurisdiction	2
Questions Presented	2
Constitution and Statutes Involved	3
Statement of the Case	3
Reasons for Granting Review	9
Conclusion	20
Appendix	
A. Appellate Court Opinion of March 1, 1961, as modified June 28, 1961, Case No. 48099	1a
B. Letter Opinion of Hon. Samuel B. Epstein, Superior Court of Cook County, Illinois, March 15, 1962	14a
C. Decree of Superior Court of Cook County, Illinois, entered March 27, 1962	17a
D. Appellate Court Opinion of November 27, 1963, Case No. 48839	19a
E. Judgment of Supreme Court of Illinois Denying Petition for Leave to Appeal	31a
F. Reorganization Plan of Chicago and Eastern Illinois Railway Company	33a
G. Article IV, Section 1, Constitution of the United States	50a
Article XI, Section 3, Constitution of the State of Illinois	50a
H. Statutes of State of Indiana	51a
Section 55-206	51a
Section 55-207	52a

PAGE

Section 55-208 ..... 53a
Section 55-2209 ..... 53a
Section 55-2210 ..... 54a

I. Section 77(f) of Bankruptcy Act, 11 U.S.C. §205(f) (Supp V to 1934 ed.) 56a

CITATIONS.

Cases:

Bohannan v. Corporation Commission of Arizona, 82 Ariz. 299, 313 P. 2d 379 (1957) 10

Carroll v. Lanza, 349 U.S. 408 (1955) 18

Denver & R. G. W. R.R. v. Goldman Sachs & Co., 212 F. 2d 627 (10th Cir. 1954) 7

Eccles v. Peoples Bank, 333 U.S. 426 (1948) 19

Humphrys v. The Winous Co., 165 Ohio St. 45, 133 N.E. 2d 780 (1956) 10

In re Ambassador Hotel Corp., 124 F. 2d 435 (C.A. 2, 1942) 16

Janney v. Philadelphia Transp. Co., 387 Pa. 282, 128 A. 2d 76 (1956) 10

North American Car Corporation v. Peerless W. & V. Machine Co., 143 F. 2d 938 (C.A. 2, 1944) 16

State v. McCune, 101 S.E. 2d 834 (W. Va. 1958) 12

Westlake Hospital Assn. v. Blix, 13 Ill. 2d 183, 148 N.E. 2d 471 (1958) 12

Wolfson v. Avery, 6 Ill. 2d 78, 126 N.E. 2d 701 (1955) 7, 12, 13

Constitutions and Statutes:

Full Faith and Credit Clause, Constitution of the United States 3, 8, 18

Constitution of the State of Illinois, Art. XI, sec. 3 ..... 3, 12

PAGE.

Bankruptcy Act, Section 77(f), 11 U.S.C. 205(f) 2, 3, 18

28 U.S.C. 1257(3) 2

Burns Annotated Indiana Statutes 2, 3, 9
Section 55-206 .....5, 13
Section 55-207 .....5, 14
Section 55-208 .....5, 10, 13
Section 55-2209 3-4
Section 55-2210 3-4

Miscellaneous:

"Mandatory Cumulative Voting: An Anachronism" by Herbert F. Sturdy, XVI The Business Lawyer 550, 554 (1961) 11

Model Business Corporation Act Ann., §35, ¶2.02, at pp. 595-596 11-12

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963.

No.

CHICAGO & EASTERN ILLINOIS RAILROAD CO., an Indiana corporation, et al.,

Petitioners,

vs.

PAUL J. KERN and IRVING M. LESCH,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO APPELLATE COURT OF ILLINOIS, FIRST DISTRICT

Petitioners, Chicago & Eastern Illinois Railroad Co., an Indiana corporation, Alfred MacArthur, David O. Mathews, and F. S. Yantis, pray that a writ of certiorari issue to review a judgment of the Appellate Court of Illinois for the First District. The judgment affirmed a trial court's declaratory decree that the petitioner railroad is required to have 13 directors elected for non-staggered terms unless changed by a vote of the holders of ⅔ of the railroad's Class A stock (App. C, *infra*, p. 17a, 18a).

Citations To Opinions Below.

The case was heard twice by the Appellate Court. The first opinion, reported at 31 Ill. App. 2d 300, 175 N.E. 2d

408 (1961), is reprinted in Appendix A, p. 1a. The second opinion, reported at 44 Ill. App. 2d 468, 195 N.E. 2d 197 (1963), is reprinted in Appendix D, p. 19a. An opinion of the trial court, which is not reported, is printed in Appendix B, p. 14a.

Jurisdiction.

The first judgment of the Appellate Court was entered March 1, 1961 and modified June 28, 1961 (A. 63,* App. 1a). Its second and final judgment was entered November 27, 1963 (R. 11**). A timely petition for leave to appeal to the Supreme Court of Illinois was denied March 16, 1964 (App. E, p. 31a, *infra*).

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(3). Petitioners contend that full faith and credit have been denied by Illinois state courts to Indiana statutes and that the Illinois courts have given an unlawful effect to and violated a reorganization plan under section 77 of the Bankruptcy Act. Both contentions were made in petitioners' pleading in the trial court (A. 60-2).

Questions Presented.

1. Did the Illinois courts, applying an Illinois rule of constitutional law, correctly hold that staggered terms for directors of an Indiana corporation, permitted by Indiana statute, are forbidden by a requirement of cumulative voting in a federal reorganization plan and an Indiana certificate of incorporation?

---

* The references to "A," are to the printed Abstract of Record incorporated at p. 21 in the certified record from the Illinois Appellate Court.

** The reference to "R." is to the page of the certified record from the Illinois Appellate Court.

2. **Are Illinois courts forbidden by the Full Faith and Credit Clause of the United States Constitution to require an Indiana corporation to have 13 directors with non-staggered terms unless permitted by a vote of ⅔ of the company's Class A stock when Indiana statutes permit staggered terms by a vote of the directors and permit less than 13 directors by a majority vote of the stockholders?**

Constitutions and Statutes Involved.

The Full Faith and Credit Clause of the United States Constitution and a section of the Constitution of the State of Illinois are printed at Appendix G, p. 50a.

Statutes of the State of Indiana, Burns Annotated Indiana Statutes (1951 volume and 1963 supplement), secs. 55-206, 55-207, 55-208, 55-2209, and 55-2210, are printed in Appendix H, pp. 51a-55a.

Section 77(f) of the Bankruptcy Act, 11 U.S.C. 205(f) [1934 ed., Supp. V 1939], is printed in Appendix I, pp. 56a-58a.

STATEMENT OF THE CASE.

The petitioner railroad was incorporated in Indiana in 1940 (A. 117-8) pursuant to a reorganization plan and decree (A. 2, 58-9) which reorganized a former Illinois corporation under Section 77 of the federal Bankruptcy Act (11 U.S.C. 205). The plan, which had been approved by the Interstate Commerce Commission, *C. and E. I. Ry. Co. Reorganization*, 230 I.C.C. Rep. 571 (1939) and Appendix F, p. 33a, provided for the transfer of the debtor's property to a new corporation to put the plan into effect (App. 34a). The plan directed that the two classes of corporate stock should have the right of cumulative voting in electing directors and that the company should have

a board of directors of 13 members with terms of one year (App. 44a, 45a, 48a).

An Indiana statute concerning the formation of railroad corporations was amended February 23, 1939 to provide for the incorporation of any railroad organized under section 77 of the Bankruptcy Act (App. 53a). The United States District Court for the Northern District of Illinois approved the plan in June 1939 (A. 50). In June 1940 the District Court found that a proposed certificate of incorporation and proposed bylaws for a new Indiana corporation conformed to the reorganization plan (A. 51-2).

The certificate of incorporation of the Secretary of State of Indiana was dated June 27, 1940 (A. 152-3). The certificate directed the immediate issuance of 383,862½ shares of Class A stock and 343,297 shares of common stock (A. 135). All stockholders were given the right of cumulative voting ("to cast as many votes as shall equal the number of his shares multiplied by the number of directors to be elected, and to cast all of his votes for one candidate or to distribute his votes among the candidates, as he shall see fit"); and the consent of ⅔ of the holders of Class A stock was required for certain amendments to the certificate or bylaws (A. 143). The certificate stated that the number of directors should be 13 (A. 145). Amendment of the certificate was provided for "in the manner prescribed by statute" (A. 150). The corporate bylaws stated that each director should hold office until the next annual meeting of the stockholders and that the bylaws could be amended by the directors (A. 53, 173).

The general railroad statute of Indiana governing petitioner railroad provided that directors should hold office for one year and until others are elected in their places

(sec. 55-206, App. 52a); that the stockholders at an annual meeting could determine that the directors should consist of any number not less than five nor more than 13 (sec. 55-207, App. 52a); and that the directors could classify the members of the board so that the terms of ¼ of the members would terminate at the first annual election after classification and ¼ at each election thereafter (sec. 208, App. 53a).

In July 1953 the directors amended the bylaws to provide staggered terms for the directors (A. 31-2). At meetings in 1954, 1955, 1956, 1957, and 1958 the stockholders voted for directors for staggered terms as provided in the 1953 bylaw (A. 5-6, 31). Respondent Paul J. Kern so voted his shares and others by proxy in the years 1955 through 1958 (A. 12-3, 31-9). During these years Mr. Kern and the railroad's president had conversations which are described in conflicting affidavits (A. 41, 65). During March through October 1958 Mr. Kern corresponded with the railroad's president and secretary concerning the 1953 bylaw (A. 23-31, 43-7). On October 29, 1958 Mr. Kern made formal demand for its repeal (A. 25-6). The board of directors repealed the bylaw at its next meeting held November 14, 1958 without knowing that the present suit had been filed on November 12, 1958 (A. 3, 14, 24-5).

Respondent Kern, owning 4,000 shares of Class A stock, sued on behalf of all owners of Class A stock (A. 3, 7). At that time approximately 75,000 shares of Class A stock and 426,000 shares of common stock were outstanding (A. 5). The staggered terms of directors under the 1953 bylaw were alleged to violate the plan of reorganization, the decree of the United States District Court, and the certificate of incorporation (A. 6). On March 8, 1960 the trial court dismissed the suit on petitioners' (defendants') motion (A. 56).

Respondents appealed to the Appellate Court, which reversed and remanded (Opinion, App. 1a). The court rejected the defense that the case was moot by reason of the repeal of the 1953 bylaw on November 14, 1958 (App. 3a-4a). The opinion said that the suit seeks "a declaration of the rights of stockholders", that the directors could revert to staggered terms at any time and prejudice the Class A stockholders ability to elect directors by cumulative voting. The case was held to be excepted from the mootness doctrine by "the substantial public interest involved" because the railroad is a "large public service corporation" with its stock listed on the New York Stock Exchange and widely held; and there is a "wide general interest in the stability of preferred stock" (App. 4a). Estoppel and other defenses were also rejected (App. 9a-11-a).

The 1939 reorganization plan and the certificate of incorporation were held to forbid staggered terms. The principal issue was said to be whether the 1953 amendment violated

> "a provision for cumulative voting and annual election of all directors, as contained in a reorganization plan, a decree of court and the articles of incorporation" (App. 1a).

The opinion noted that the reorganization plan

> "included a provision for the issuance of Class A preferred stock with the right of cumulative voting in the election of directors and for a board of thirteen members, each director to serve one year". (App. 1a).

The basic legal question was said to be whether the power of minority shareholders to cumulate votes "should be diminished or extinguished" in contravention of the reorganization plan and certificate of incorporation. For,

the opinion said, citing *Wolfson* v. *Avery*, 6 Ill. 2d 78, 81-82, "that is the natural end result of classified directorships and staggered elections" (App. 4a).

The necessity of enforcing the reorganization plan was emphasized (App. 6a-7a):

> "When a reorganization plan has been certified by the Interstate Commerce Commission and approved by the court, as has been done in this case, that plan becomes final, is binding upon the debtor and all other interested parties, and must be enforced as written. 11 U.S.C.A., secs. 205, 624; *Denver & R. G. W. R. R.* v. *Goldman Sachs & Co.*, 212 F. 2d 627 (10th Cir. 1954). The plan of reorganization unconditionally fixes the term of each director at one year. There is nothing in the language of the certificate of incorporation which negates this clear and unambiguous language embodied in the Commission order."

Answering petitioners' contention that cumulative voting was not a special right of the Class A shareholders since the common stock shareholders had the same right, the opinion again returned to the reorganization plan (A. 9a):

> "The answer to this contention is that preferred shareholders are preferred, and that the rights which protect them against dilution of their power to elect directors were given to them by the plan of reorganization and the certificate of incorporation."

And again (App. 9a):

> "The violation of their [respondents'] rights is in contravention of an Interstate Commerce Commission order, the plan of reorganization, the Federal court decree, and the certificate of incorporation. We are of the opinion that estoppel is inapplicable."

In a final paragraph on the reorganization plan, the opinion said weight had been given to it but explained (App. 11a):

". . . we felt that the plan had a strong bearing on the proper construction and interpretation of the articles of incorporation and the bylaws. We do not hold that the reorganization plan and agreement is now binding on defendant corporation. The basic document on which plaintiffs' right must be determined is the certificate of incorporation."

On remandment petitioners (defendants) filed an answer alleging (A. 57-63) that petitioner railroad was governed by its certificate of incorporation and bylaws under Indiana law; that the 1953 bylaw did not violate the certificate of incorporation but was in accord with it and Indiana statutes cited in the answer; that the relief sought would violate the Full Faith and Credit Clause of the United States Constitution; that the controversy became moot when the 1953 bylaw was repealed in 1958; and that recovery was barred by laches and estoppel (A. 62).

Respondents made motions on the pleadings and for summary judgment (A. 64-5); petitioners filed affidavits in opposition (A. 65, 66, 117). The trial court wrote an opinion and entered a summary decree in respondents' favor (App. B and C, pp. 14a-18a). The opinion stated that the Appellate Court had adjudicated that the certificate of incorporation, "construed in the light of the plan of reorganization," fixes the number of directors at 13 and provides for non-staggered one year terms of office for such directors with cumulative voting rights (App. 14a-15a). The decree declared that the railroad's certificate of incorporation "requires that said railroad have a board of thirteen directors elected for uniform terms of one year each with cumulative voting by shareholders" and that the consent of the holders of at least ⅔ of the outstanding Class A stock was necessary to amend these requirements (App. 17a-18a).

The Appellate Court affirmed in a second opinion (App. 19a); held that the case was not moot in a detailed discussion of the law, including federal cases (A. 20a-26a); stated that the court's other rulings on the first appeal were the law of the case that would not be considered again (A. 26a); and concluded that the Indiana statutes relied on by petitioners (defendants) "did not raise any questions of law or fact" (App. 28a).

The Illinois Supreme Court denied the petition for leave to appeal on March 16, 1964 (Appendix E, pp. 31a-32a).

REASONS FOR GRANTING REVIEW

The Illinois courts have wrongly decided two substantial federal questions which, so far as we are aware, have never been decided by this Court. The 1939 reorganization plan under the Bankruptcy Act and the Act itself have been misapplied by reading into the pla an irrelevant Illinois rule of substantive law and by using the plan to prevent future corporate changes. Instead of looking to Indiana statutes to determine the legal effect of an Indiana certificate of incorporation, the Illinois courts have applied an Illinois rule of substantive law in violation of the Full Faith and Credit Clause of the United States Constitution.

These errors are the sole support for the specific declaration that the railroad must have 13 directors with non-staggered terms unless the holders of ⅔ of the Class A stock consent to a change. The rulings go further in broadening the rights of cumulative voting and a ⅔ vote of the Class A stock to the detriment of the holders of common stock. Since there are now only 75,000 Class A shares but 426,000 common shares (A. 3), the rulings will give the holders of less than 5% (25,000) of the total shares

(501,000) an ill defined but wide veto power over future changes in the corporation's affairs.

Two main provisions of the declaratory decree forbid what Indiana statutes expressly permit.

First, in forbidding staggered terms for directors, the declaratory decree is directly contrary to an Indiana statute. Section 55-208 of the statute (App. 53a) says that the board of directors may classify the directors and provide for staggered terms. This may be done without amending the certificate of incorporation or bylaws*. The declaratory decree is supportable only if, as contended by the respondents and held by the Illinois courts, the right of cumulative voting granted to all stockholders in the Indiana certificate of incorporation (A. 143) would be violated by the staggered terms of directors. There is no such holding in Indiana. Even where there are constitutional or statutory provisions for mandatory cumulative voting and the provisions are worded as the certificate of incorporation in this case, the courts have uniformly ruled that staggered terms are not thereby forbidden. *Bohannan* v. *Corporation Commission of Arizona*, 82 Ariz. 299, 313 P. 2d 379 (1957); *Humphrys* v. *The Winous Co.*, 165 Ohio St. 45, 133 N.E. 2d 780 (1956); and *Janney* v. *Philadelphia Transp. Co.*, 387 Pa. 282, 128 A. 2d 76 (1956). The Pennsylvania Supreme Court explained why manda-

---

* The section reads: "*Classification of Directors.*—It shall be lawful for the board of directors of any railway company . . . , by lot or otherwise, to so classify the members thereof, that one-fourth (as near as may be) shall terminate their official terms as directors at the first annual election thereafter, and one-fourth at each subsequent election; and after being thus classified, the stock and bondholders shall elect only the number of the board of directors necessary to fill the vacancies created by the expiration of the period of services fixed as aforesaid." (Burns Indiana Stat. Ann., sec. 55-208, App. 53a).

tory cumulative voting does not forbid staggered terms (128 A. 2d at 79-80):

> "The cumulative voting strength of a minority is diluted in certain cases not only by staggering the terms of the directors but also by many other rules, methods, systems, and usages of corporate organization, as, for example, having a small board instead of a large number of directors, having longer terms for directors than merely one year, having vacancies on the board filled by election by the board itself as permitted by many statutes. . . . If staggering the terms of corporate directors is unconstitutional because of its interference to some extent with the most efficient use of the right of cumulative voting, the constitutionality of all these practices would presumably be likewise jeopardized for the same reason."
>
> ". . . All that the Constitution provides is that each stockholder should have the right to concentrate his votes on one or more candidates to be chosen in any given election; that right is undisputed, but as to how many candidates there shall be at the election, whether they must consist of all the directors of the corporation, whether they cannot be classified and their elections staggered,—as to these and many other factors which necessarily enter into each situation the Constitution is wholly silent; to write into it any such limiting or qualifying provisions as contended for by plaintiff would be an extreme exercise of judicial legislation."

There are popular misconceptions about cumulative voting. "Cumulative voting has a superficial appeal as a means of assuring minority interests are 'represented' ". See "Mandatory Cumulative Voting: An Anachronism", by Herbert F. Sturdy, XVI The Business Lawyer, 550, 554 (1961). However, in most states statutes expressly permit the classification of directors with staggered terms. See *Model Business Corporation Act Ann.*, §35, ¶2.02, at pp.

595-596 (1960) listing 36 such states and seven in which staggered terms are authorized by implication. The Indiana legislature must be presumed to have had the public interest in mind in allowing staggered terms. The obvious legislative purpose is

> "that, as in the United States Senate, there will always be a portion of the members who are holdovers and thus have had experience in the management of the corporation. The system is designed to provide continuity of management." *Model Bus. Corp. Act Ann.*, §35, ¶4, at p. 598 (1960).

Since votes can be cumulated for the number of directors to be elected at each annual election for staggered terms, the mere statement of the right of cumulative voting does not imply that staggered terms are forbidden.

Illinois is one of two states in which staggered terms have been held invalid because of the peculiar language used in stating the constitutional requirement of cumulative voting. *Wolfson* v. *Avery*, 6 Ill. 2d 78, 94, 126 N.E. 2d 701 (1955); *State* v. *McCune*, 101 S.E. 2d 834, 838 (W. Va. 1958). In the *Wolfson* case the opinion emphasized that the Illinois constitution described cumulative voting for business corporations as entitling the stockholder to "give one candidate as many votes as the *number of directors* multiplied by the number of his shares" (Art. XI, sec. 3, quoted in App. G, *infra* p. 50a); and staggered terms were to be forbidden since this language required shares to be multiplied by "the total number" of directors and not merely those divided into a class. (6 Ill. 2d at 94) In contrast, In *Westlake Hospital Assn.* v. *Blix*, 13 Ill. 2d 183, 191-192, 148 N.E. 2d 471 (1958), which involved a nonprofit corporation not governed by the constitutional language quoted, cumulative voting rights were held not to forbid staggered terms.

In the present case this Illinois prohibition against staggered terms for directors of business corporations has been read into the federal reorganization plan and the Indiana certificate of incorporation. That this is the sole basis of the Appellate Court's ruling is proved by the statement early in its first opinion (App. 4a):

> "The question is whether the power of minority shareholders to cumulate sufficient votes to elect representatives on the board of directors should be diminished or extinguished in contravention of the provisions of a plan of reorganization, a decree of court, and articles of incorporation. *For that is the natural end result of classified directorships and staggered elections.* See *Wolfson* v. *Avery*, 6 Ill. 2d 78, 81-82, 126 N.E. 2d 701, 704." (Emphasis added)

Here the Appellate Court has held, applying an *Illinois* rule of constitutional law, that the cumulative voting provisions of the *federal* reorganization plan and the *Indiana* certificate of incorporation have forbidden staggered terms. The holding was not a mere interpretation of language. The holding was the erroneous application of a rule of law peculiar to Illinois, namely, that the *"natural end result"* of staggered terms is to *"extinguish"* the right of cumulative voting.

Not until the last paragraph of its second opinion did the Appellate Court (App. 28a) discuss the Indiana statutes. It held them to be wholly irrelevant (*"they did not raise any questions of law or fact"*). There was said to be a conflict between section 55-206 providing that directors "shall hold their office for one (1) year and until others are elected in their places" (App. 52a), and section 55-208, permitting staggered terms of more than one year (App. 53a). There is no conflict: section 55-208 qualifies section 55-206 so that the one year term is extended if annual

elections are retained with staggered terms. Even if there were a conflict, the Appellate Court gives no reason for preferring section 55-206 to section 55-208. The opinion concludes by saying that the statutory provision for staggered terms "is not mandatory and the defendant railroad company is not required to violate its commitments to its Class A stockholders" (A. 29a). Here in its last sentence the Appellate Court reverts to the erroneous adjudication, derived from the Illinois constitutional provision and contrary to the Indiana statute, that mandatory cumulative voting forbids staggered terms.

Second, the declaratory decree is contrary to Indiana law in requiring a ⅔ vote of Class A stockholders to amend the provision of the certificate of incorporation that the railroad shall have 13 directors (A. 145). Article IX of the certificate makes it amendable in the manner prescribed by statute (A. 150). A special provision in section 55-207 of the Indiana statute permits the stockholders by majority vote at any annual meeting to determine that the directors shall consist of any number not less than 5 nor more than 13 (App. 52a). This section is not mentioned in the opinions of the Illinois courts.

A ⅔ vote of the Class A stock would be required only if the ⅔ vote clause of the Indiana certificate of incorporation (A. 143) applied to a change in the number of directors. The clause clearly does not apply, since it is limited to amendments concerning

> "the designation, rights, preferences, qualifications, limitations, restrictions, voting rights, values and interests of the Class A stock".

The clause is near the end of a long article, Article IV (A. 135-145 at 143), which has many provisions concerning the rights of Class A stockholders, including cumula-

tive dividends ahead of the common stock, rights on dissolution or liquidation, etc. An introductory sentence in the article sets forth the scope of the matters covered, stating that the Class A stock

> "shall have the following designations, relative rights, preferences, qualifications and limitations, restrictions, voting rights, values and interests." (A. 135)

These words are in the same order and are substantially identical with the description of the scope of the ⅔ vote clause at the end of the article (A. 143). The ⅔ vote clause was drafted so that its scope would coincide with the special rights of the Class A stock described in Article IV. Otherwise it would be difficult to determine what was covered.

Here again the Illinois courts have misconceived the effect of the requirement of cumulative voting. The Appellate Court extends the ⅔ vote requirement as if the number of directors was a part of the right of cumulative voting. Nothing is said in Article IV about the number of directors, which is not a special interest of the Class A stock. The ⅔ vote clause does not apply to it. The Indiana statute, which clearly authorizes a majority vote of the stockholders to change the number of directors, is effectively nullified by the Illinois courts in construing the ⅔ vote clause of the Indiana certificate of incorporation.

For two federal reasons, the Illinois courts were required to apply these disregarded Indiana statutes.

1. The state of incorporation of the new reorganized company was recognized by the reorganization plan as providing the controlling law for the future operations of the railroad. Paragraph B of the plan authorized the transfer of the debtor's property to a "new corporation

. . . formed for this purpose under the corporate laws of such State or States as shall be necessary in order to put into effect and carry out the plan" (App. 34a). The District Court accordingly approved the certificate of incorporation and bylaws of a new Indiana corporation on June 22, 1940 (A. 51-2). Five days later the certificate was issued by the Indiana Secretary of State (A. 152-3). Thereafter the railroad's affairs were required to be governed by Indiana statutes and the Indiana law of corporations. See *In re Ambassador Hotel Corp.*, 124 F. 2d 435, 436-7 (C.A. 2, 1942), *North American Car Corporation* v. *Peerless W. & V. Machine Co.*, 143 F. 2d 938, 940 (C.A. 2, 1944). When the federal District Court here selected an Indiana corporation "as an instrumentality of reorganization", the bankruptcy court "sent it out into the state as fully subject to state law as though the court had had nothing to do with its creation" (124 F. 2d at 437). Once the case was closed as the Bankruptcy Act required and the business started off "on a new and to-be-hoped-for more successful career", the District Court "cast off as quickly as possible all leading strings" which may "throw doubt upon its responsibility" (143 F.2d at 940).

In the present case, more than 20 years after the railroad's incorporation in Indiana as provided by the Bankruptcy Court, the Illinois courts have resorted for guidance to the executed reorganization plan under Illinois law rather than to Indiana statutes. The first Appellate Court opinion completely disregarded Indiana law, for the word "Indiana" was used only twice in the whole opinion; and then in merely stating that the railroad was incorporated and had an office and business in Indiana (App. 1a). But it repeatedly spoke of the rights given the Class A stockholders by the reorganization plan

(App. 1a, 7a, 9a, 10a). The trial court's opinion, while saying that the plan did not govern the operations of the Indiana corporation, stated that the certificate of incorporation "interpreted and construed in the light of the plan of reorganization" fixed the number of directors at 13 and provided for "non-staggered one-year terms" (App. 14a). To the same effect was the second Appellate Court opinion which referred to Indiana statutes in the last paragraph, but rejected their application in favor of the railroad's "commitments to its Class A stockholders". Here the opinion relied on the right of cumulative voting in the federal reorganization plan and the Indiana certificate of incorporation which the court held to include a prohibition of staggered terms as under Illinois constitutional law (App. 29a).

The reorganization plan was not used by the Appellate Court merely to construe the certificate of incorporation as the appellate and trial courts contended (App. 11a, 14a). The plan was used as a source of the decisive rule of law. The plan contained the same brief clause for stating the right of cumulative voting of each of the two classes of stock, "This stock shall have the right of cumulative voting in the election of directors" (App. 44a-45a). The Appellate Court's holding that these simple clauses of the plan forbad staggered terms was a determination of a rule of law, although the notion for it came from peculiar language of the Illinois Constitution (App. 50a) held in Illinois to forbid staggered terms for business corporations. The cumulative voting clause in the certificate of incorporation (A. 143) was much more detailed than the clauses in the plan. The Appellate Court did not construe this language of the certificate, but held that it had the same effect as the clauses of the reorganization plan. The plan was not used to find the meaning of doubtful language in

the certificate. The plan was used to find a rule of law, which was then read into the certificate.

In the guise of construing the certificate, the Appellate Court used the plan to make law. And that law was federal.

The misapplications of the reorganization plan and so of the federal Bankruptcy Act were determinative of the holdings in the declaratory decree as shown by the opinions. From one standpoint the decree gives unwarranted effect to the provision in section 77(f) of the Bankruptcy Act that the corporation organized to carry out the plan "shall put into effect and carry out the plan and the orders of the judge relative thereto" [11 U.S.C. 205(f)]. Further, this statutory admonition is violated when the decree fails to obey the direction in Paragraph B of the plan to follow Indiana law. The decree therefore raises a substantial federal question under a federal statute. The decree seriously affects the relative rights of the common and Class A shareholders of the petitioner railroad. In addition, the Appellate Court's opinions have a far reaching effect as precedent because they encourage resort to old reorganization plans in asserting legal rights properly governed by current state statutes.

2. The Illinois courts' disregard of controlling Indiana statutes is in violation of the Full Faith and Credit Clause of the United States Constitution (Art. IV, sec. 1, App. 50a). It is settled that a state statute is a "public act" within the meaning of the clause. *Carroll* v. *Lanza*, 349 U.S. 408, 411 (1955). The constitutional violation is the fact that the declaratory decree forbids what Indiana law permits this Indiana corporation to do. It is essential that the internal affairs of a corporation be

controlled by the law of one state, the state of incorporation. Here Illinois law has been wrongly applied and Indiana law rejected.

The Appellate Court judges even criticize petitioners for continuing to resist this declaratory relief (App. 25a, 29a-30a). They have not appreciated the heavy overbalance given in the decree to the interests of the Class A stockholders to the detriment of the common stockholders. This suit, properly dismissed as moot by the trial court in March 1960, has been protracted through the years only by the misapplication of Illinois law and the federal Bankruptcy Act in violation of the Full Faith and Credit Clause.

The Illinois courts have reached out in this case to impose a declaratory, summary decree on an Indiana corporation in furtherance of an Illinois rule of constitutional law (no staggered terms for directors of business corporations). This Court has criticized such a use of summary procedure as likely to be "treacherous" and has urged caution against "the subtle tendency to decide public issues free from the safeguards of critical scrutiny of the facts, through use of a declaratory summary judgment". *Eccles* v. *Peoples Bank,* 333 U.S. 426, 434 (1948).

The Illinois Appellate Court, in holding that the case called for a declaratory decree, emphasized "the wide general interest in the stability of preferred stock" and in the petitioner railroad's 75,000 Class A shares (App. 4a, 26a). The declaration harms the holders of the railroad's 426,000 shares of common stock and common shareholders generally to the same extent that it benefits Class A shares. The Illinois Supreme Court has denied review. Since the de-

claratory decree was clearly wrong under federal law, the public interest requires that the decree be reviewed and reversed by this Court.

Conclusion

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

JAMES A. VELDE
JOHN K. NOTZ, JR.
33 South Clark Street
Chicago, Illinois 60603

PATRICK C. MULLEN
646 Chicago Road
Chicago Heights, Illinois
Counsel for Petitioners.

Of Counsel
GARDNER, CARTON, DOUGLAS, CHILGREN & WAUD
33 South Clark Street
Chicago, Illinois 60603

June 1964

APPENDIX A.

Appellate Court Opinion of March 1, 1961, as modified on denial of rehearing on June 28, 1961, Case No. 48099.

MR. PRESIDING JUSTICE SCHWARTZ delivered the opinion of the court.

This is an appeal from an order sustaining defendant's motion for summary decree and dismissing for want of equity a suit brought by preferred shareholders seeking a declaratory decree holding that defendant company had illegally amended its bylaws in order to create a system of staggered elections of directors, and for injunctive and other relief. The principal issue is whether that amendment is in violation of a provision for cumulative voting and annual election of all directors, as contained in a reorganization plan, a decree of court and the articles of incorporation.

Defendant Chicago and Eastern Illinois Railroad Company was an Illinois corporation until 1940 when, after reorganization under Section 77 of the Bankruptcy Act, it was incorporated as an Indiana corporation. It is licensed to do business in the State of Illinois, where it maintains general offices and transacts business. It has offices and does business in Indiana as well. A plan of reorganization approved by the Interstate Commerce Commission in 1939, 230 I.C.C. Rep. 571, included a provision for the issuance of Class A preferred stock with the right of cumulative voting in the election of directors and for a board of thirteen members, each director to serve one year. That plan was subsequently approved and confirmed by the United States District Court for the Northern

District of Illinois, Eastern Division. *In the Matter of Chicago & E.I. R.R., Debtor,* No. 52871.

Defendant company was duly organized according to plan. Its certificate of incorporation provided for the right of cumulative voting for all stockholders. As to holders of Class A stock (preferred), it was provided that so long as any such stock should remain outstanding, the consent of at least two-thirds thereof should be given to amend, alter or repeal any provisions of the certificate of incorporation or bylaws which have reference to preferences, voting rights, and other incidents of the Class A stock. The certificate also provided for thirteen directors and stated that they should serve for a period not exceeding one year. Bylaws were adopted which conformed to the plan and the certificate of incorporation, and the company operated thereunder until 1953. These will be examined in greater detail later in this opinion.

On July 10, 1953, the railroad's board of directors approved an amendment to the bylaws which provided for thirteen directors, four of whom were to hold office for one year, four to hold office for two years, and five to hold office for three years, and that as each director's term of office expired, he or his successor was to be elected for three years. Thus, the maximum number of directors to be elected in any one year was to have been five and the minimum, four, thereby creating a system of classified directors and staggered elections and sharply qualifying or completely defeating the cumulative voting provisions of the plan.

On November 12, 1968, plaintiff Kern filed suit as a Class A preferred shareholder in behalf of himself and others similarly situated, naming the railroad and individual members of the board of directors as defendants, seeking the relief hereinbefore referred to. On November

14, 1958 the defendant directors met at a regularly scheduled meeting and adopted a resolution repealing the July 10, 1953 amendment and providing for non-staggered, one year terms of office for the company's directors, as originally fixed in the plan of reorganization. At the same meeting, four directors whose remaining terms exceeded one year and expired after May 1959 resigned and were then re-elected by the remaining nine directors, to serve until May 1959. Thereafter, five more directors whose remaining terms exceeded one year and expired after May 1959 resigned and were also re-elected to new terms until May 1959.

On April 6, 1959 plaintiff Lesch, also a Class A preferred shareholder, petitioned and was granted leave to become a party plaintiff and to adopt the allegations and prayers of Kern's complaint, including the prayer for relief. On July 31, 1959, defendants moved for summary decree, supporting their motion by affidavits and suggestions. On October 14, 1959, plaintiffs filed their motion for summary decree, also supported by an affidavit and suggestions. An order was entered March 8, 1960, denying plaintiffs' motion and granting defendants' motion for summary decree and dismissing the suit for want of equity at plaintiffs' costs. It is from that order that plaintiffs appeal.

Defendants contend that inasmuch as the directors' resolution in November 1958 repealed the classes of directors and the staggered election system provided for in the 1953 resolution and provided for a new board as requested in plaintiffs' complaint, there was nothing for the court to declare or enjoin, the 1958 resolution having eliminated whatever justiciable controversy may have existed, thus making the case moot. This suit seeks a declaration of the rights of stockholders. As it stands now, the

board of directors may at any time revert to staggered elections, and again Class A stockholders may feel their preferential position prejudiced by their inability to elect directors by cumulative voting. Plaintiffs, if they are right, are entitled to a more stable disposition of the litigation than one which gives them their rights, but reserves to their opponents the power at any time to restore the former status.

Even if this case were considered moot, it is within the exception to the rule governing moot decisions because there is a substantial public interest involved. *People ex rel. Wallace* v. *Labrenz*, 411 Ill. 618, 104 N.E.2d 769; *Kunin* v. *Forman Realty Corp.*, 21 Ill.App.2d 221, 224, 157 N.E.2d 785, 787. The railroad company is a large public service corporation. Its stock is widely held and available for purchase by the public. Its stock is listed on the New York Stock Exchange. There is a wide general interest in the stability of preferred stock, and efforts to eliminate preferences thereof have been the subject of much litigation. The question is whether the power of minority shareholders to cumulate sufficient votes to elect representatives on the board of directors should be diminished or extinguished in contravention of the provisions of a plan of reorganization, a decree of court, and articles of incorporation. For that is the natural end result of classified directorships and staggered elections. See *Wolfson* v. *Avery*, 6 Ill.2d 78, 81-82, 126 N.E.2d 701, 704. We conclude that we should consider the merits of the case.

The plan of reorganization relative to rights of Class A preferred stockholders made the following provisions, among others, approved by the Interstate Commerce Commission and the United States District Court:

"Q. Preferred stock having a par value of $40 a share shall be issued to the amount of 383,862½ shares.

. . . This stock shall have the right of cumulative voting in the election of directors."

"X. Upon consummation of the plan the reorganized company shall have a board of directors consisting of 13 members. The term of office of each director shall be one year."

Article IV of the railroad's certificate of incorporation reads in part as follows:

". . . each stockholder, without distinction as to class, shall be entitled to one vote for each share of stock standing in his name on the books of the Company, and in all elections for directors each stockholder shall have the right of cumulative voting. . . .

"So long as any Class A stock shall remain outstanding the consent of the holders of at least two-thirds of the Class A stock then outstanding . . . shall be necessary to amend, alter or repeal any of the provisions of this Certificate of Incorporation, or of the by-laws enacted thereunder, which have reference to, or which are protective of, the designation, rights, preferences, qualifications, limitations, restrictions, voting rights, values and interests of the Class A stock."

Article VII of the document reads in part as follows:

"The number of directors which the Company shall have shall be thirteen (13). Directors need not be stockholders of the Company or residents of the State of Indiana. The names of the members of the first board of directors, who shall serve until May 15, 1941, a period not exceeding one (1) year, are as follows: . . ."

Defendants contend that the plan of reorganization, as approved by the Interstate Commerce Commission and the court, with respect to the provision for a board of thirteen directors to serve for one year, was not intended as a restriction extending into infinity. They place great

emphasis upon Paragraph X of the plan, before quoted, which provides that *upon consummation of the plan* the company shall have a board of thirteen members, the term of office of each director to be one year, and upon the court's decree of June 16, 1941, finding that the reorganization plan has been fully carried out and approving the consummation thereof by the railroad and its officers. In other words, by that interpretation the protection afforded Class A preferred stockholders was only for that fleeting moment in which the plan was consummated and perhaps for the term of one year thereafter. This is indeed conjuring up a shadow for what was offered as a hope of substance to those security holders who were asked to give their consent to the plan and for whose supposed protection the provision was made. We do not believe that the reorganizers so considered it when it was prepared or that the court had such an interpretation in mind when it was approved.

Defendants further argue that there is no requirement in the certificate of incorporation inflexibly fixing the number of directors at thirteen, each of whom may serve for no more than one year. They contend that the words "to be elected" contained in the provision entitling each shareholder to cast as many votes as shall equal the number of his shares multiplied by the number of directors *to be elected* makes clear that it was intended that the number of directors to be elected would vary. That is drawing a farfetched inference in order to override the language to the contrary in the plan of reorganization which the certificate of incorporation was designed to implement.

When a reorganization plan has been certified by the Interstate Commerce Commission and approved by the court, as has been done in this case, that plan becomes

final, is binding upon the debtor and all other interested parties, and must be enforced as written. 11 U. S. C. A., secs. 205, 624; *Denver & R. G. W. R. R.* v. *Goldman Sachs & Co.*, 212 F.2d 627 (10th Cir. 1954). The plan of reorganization unconditionally fixes the term of each director at one year. There is nothing in the language of the certificate of incorporation which negates this clear and unambiguous language embodied in the Commission order.

We have before quoted from Article VII of the certificate containing the language from which defendants' interpretation is derived. It merely states that the names of the members of the first board, who shall serve until May 15, 1941, a period not exceeding one (1) year, are as follows (names follow). Defendants argue from this that the limitation of one year applies only to the first board. That interpretation appears to us to strain severely the plain meaning of the sentence. As if to make certain that the directors' terms of office should not exceed one year, words are added: "a period not exceeding one year." It indicates nothing more than a cautious purpose to keep within the one year limitation.

Defendants say that the make-up of the first board of directors was qualified to protect the interest of the Reconstruction Finance Corporation. Hence, it provided that upon consummation of the plan, the board should consist of thirteen members, five to be chosen by Kenneth D. Steere, five by Carrol M. Shanks (both of whom were reorganization managers) and three by the Reconstruction Finance Corporation. It then provided that as long as the Reconstruction Finance Corporation held not less than one million dollars of certain bonds, the selection of three members of each succeeding board should be subject to its approval. That is consistent with and does not exclude the conclusion that the provision for the election of directors

annually was also intended to preserve the right of cumulative voting given to the Class A stockholders. In the period in which this reorganization was developed there was extensive litigation over efforts by common stockholders to eliminate or qualify the preferences of preferred stockholders. It was natural, therefore, that a plan of reorganization providing for cumulative voting should also include a provision for the election of the directors annually. Such a provision is important to the holders of stock having cumulative voting rights. Otherwise, the right is a snare and a delusion. To defeat the right, if their position were correct, the majority stockholders could always establish enough classes to outvote the holders of the minority stock.

The next point made by defendants relates to a provision of the initial bylaws that the company should have thirteen directors and that "each director shall serve for the term for which he is appointed or elected. . . ." This language, defendants argue, "presupposed that, excepting the first board of directors, the term of office would not necessarily be one year nor that each director would hold office for the same period of time." The routine statement by the draftsman of the bylaws that a director should serve for the term appointed or elected is a slender reed on which to base a denial of an important right granted to the Class A stockholders.

The next bylaw relied upon by defendants to support their theory is a standard authorization giving the board of directors the power "to make, alter, amend and rescind the bylaws of the Company." This authorization must be read within the context of the language in which it appears in Article VII of the certificate of incorporation, qualifying the nature of the power given. That article specifically excepts such powers, rights and privileges

as may be reserved to the stockholders by law or by the certificate of incorporation.

Defendants argue that since the certificate of incorporation provides that there be no distinction as to class in matters pertaining to the cumulative election of directors, the Class A preferred shareholders had no rights peculiar to them as a class in such elections, and that to have requested their consent to the resolution would have given them a degree of control over the affairs of the railroad in excess of and in derogation of the rights of holders of common stock. The answer to this contention is that preferred shareholders are preferred, and that the rights which protect them against dilution of their power to elect directors were given to them by the plan of reorganization and the certificate of incorporation. The provision for notice to and consent of Class A stockholders presents no difficulty so far as the voting rights of common stockholders are concerned. Both have equal rights in cumulative voting. No similar provision for notice and consent is needed for common stockholders.

Defendants contend that plaintiffs are estopped from maintaining this suit in any event because Kern participated and acquiesced in activities proceeding from the 1953 amendment and because they failed to make a formal demand upon the directors requesting that the amendment be repealed. The doctrine of estoppel is essentially equitable. Not only Kern, but all Class A stockholders are involved. We must measure the nature of their right to cumulative voting against Kern's alleged inconsistent conduct. The violation of their rights is in contravention of an Interstate Commerce Commission order, the plan of reorganization, the Federal court decree, and the certificate of incorporation. We are of the opinion that estoppel is inapplicable. *Durkee* v. *People ex rel. Askren*, 156

Ill. 354, 40 N. E. 626; *Automatic Steel Products, Inc.* v. *Johnston*, 31 Del. Ch. 469, 64 A.2d 416; 8 Fletcher, Corporations, sec. 4201, pp. 776-77 (931). Cf. *Westlake Hospital Assn.* v. *Blix*, 13 Ill.2d 183, 148 N.E.2d 471. Moreover, Kern has shown that he persistently argued against the bylaw in question and for a restoration of cumulative voting.

In his affidavit Kern states that shortly after July 1953 he protested to various officials of defendant company that the staggered system was illegal; that he had numerous conferences with the president of the company with respect thereto in the years 1954 to 1958; that on March 12, 1958 he wrote the secretary-treasurer of defendant company regarding the illegality of the staggered system; that on May 9, 1958 after the annual meeting he advised the directors of defendant company that he would by proper legal action contest the illegality of the staggered system; that on October 21, 1958 he again wrote the secretary-treasurer, advising him that he had retained lawyers to establish his position and that at no time had he acquiesced in the system. He attached a copy of his letter of March 12, 1958 to his affidavit. He received a reply from the secretary-treasurer dated March 26, 1958 stating the position of the company as upholding the right of the board to establish a classified system of directors and to revoke the provision for cumulative voting. On October 21, 1958 he wrote the secretary-treasurer that he had retained lawyers to correct the method of voting; that he was the record owner of at least 4000 shares of Class A stock and had given his authorization to his attorneys to examine the books of the company on his behalf. Thus, many specific requests were shown and were not denied.

It is also urged that Kern did not exhaust his non-judicial remedies. The review we have made of the con-

tinuous conferences over the years establishes that Kern did all he could to induce the directors to revoke the amendment in question and that nothing was done until finally the directors were convinced that Kern would bring suit. Throughout that period they maintained they had the right to adopt the amendment. The attitude of the majority directors was such that Kern was justified in instituting his suit without further demand.

Defendants' final argument is directed toward the proposition that plaintiffs are not entitled to recover expenses and attorneys' fees. Plaintiffs answer this contention by asserting that notwithstanding the prayer in their complaint for these items, no application was made for them in the trial court, nor is any petition for expenses or fees pending before this court. There is therefore no occasion for this court to consider that matter.

In this opinion we have given weight to the provisions of the plan of reorganization. We have done so because the railroad corporation was organized pursuant to and for the consummation of the plan and therefore we felt that the plan had a strong bearing on the proper construction and interpretation of the articles of incorporation and the bylaws. We do not hold that the reorganization plan and agreement is now binding on defendant corporation. The basic document on which plaintiffs' rights must be determined is the certificate of incorporation.

Both parties made motions for summary decree. As before stated, the chancellor sustained defendants' motion and denied the motion of plaintiffs. While we have concluded that the chancellor erred in sustaining defendants' motion, it does not follow that he erred in denying plaintiffs' motion. There is not and there cannot be an appeal from the order denying plaintiffs' motion. That is not a final order nor is there any provision for an appeal

from such an order. *Allensworth* v. *First Galesburg Nat. Bank & Trust Co.*, 350 Ill. App. 263, 112 N.E.2d 528. Therefore the cause must be remanded.

The order of the chancellor is reversed and the cause is remanded with directions to deny defendants' motion for summary decree, to require defendants to answer the complaint, and for such other and further relief as is not inconsistent with the views herein expressed.

Order reversed and cause remanded with directions.

McCormick, *P. J.*, concurs.

Dempsey, *J.* dissents.

DEMPSEY, *J.*, dissenting:

If it were not for the question of mootness I would agree with the opinion of my colleagues.

Two days after the plaintiffs filed their case, the defendants modified their procedure for the election of directors. The controversy no longer existed. The case was moot while in the trial court, is moot here, and should be dismissed.

"The general rule is that when a reviewing court has notice of facts which show that only moot questions or mere abstract propositions are involved or where the substantial questions involved in the trial court no longer exist, it will dismiss the appeal or writ of error." *People* v. *Redlich,* 402 Ill. 270. An appeal concerning a moot question need not be dismissed if there is a compelling reason of public interest which warrants its review. "Among the criteria considered in determining the existence of the requisite degree of public interest are the public or private nature of the question presented, the desirability of an authoritative determination for the future guidance of public officers and the likelihood of future recurrence of the question." *People ex rel. Wallace* v. *Labrenz,* 411 Ill. 618. I do not see where this case approaches such standards. I do not believe that interpreting this Indiana corporation's plan of reorganization, certificate of incorporation and bylaws is of such substantial public interest to justify an Illinois court making this case an exception to the rule; nor do I believe that we should render a judgment just to discourage a possible reversion to the former method of electing directors or to guide potential future litigation. *LaSalle National Bank* v. *City of Chicago,* 3 Ill. 2d 375.

APPENDIX B.

Letter Opinion of the Hon. Samuel B. Epstein, Chief Justice, Superior Court of Cook County, Illinois March 15, 1962

In re: Paul J. Kern, et al.
v. Chicago and Eastern Illinois Railroad Company, etc. et al.
No. 58 S 18217

Gentlemen:

In order for the court to rule properly upon plaintiff's motion for judgment on the pleadings and for summary judgment, it is necessary to determine what issues were adjudicated by the Appellate Court, and what issues, if any, remain undetermined. Obviously, this court is bound by the determination of such issues as the Appellate Court has ruled on, regardless of the court's personal opinions on same.

In the opinion of this court, the Appellate Court has determined and adjudicated the following:

1. That the suit should not be dismissed as moot because the 1958 resolution repealed the 1953 provisions for the classification of the directors and the staggered election system, and that, consequently, the court is justified in declaring the rights of the stockholders in this suit.

2. That although the plan of reorganization of the former Illinois corporation does not govern the operations of the defendant Indiana corporation, the certificate of incorporation and bylaws, as amended, interpreted and construed in the light of the plan of reorganization, fixes the number of directors at

thirteen, and provides for non-staggered one-year terms of offices for such directors, with cumulative voting rights.

3. That in order to change the above requirements of thirteen directors elected for a non-staggered term of one year only, a two-thirds vote of the Class A stockholders is required.

4. That the plaintiffs are not estopped from maintaining this suit.

5. That the plaintiffs were not required to exhaust any further non-judicial remedy, but were justified in instituting this suit without further demand.

The Appellate Court did not rule on

(1) the plaintiffs' motion for summary judgment;

(2) such matters as may be raised by the defendants' answers to the complaint.

The answers filed by the defendants, supported by certain affidavits, do not raise any new issues. They reallege the issues which were involved before the Appellate Court and determined as above set forth. The affidavits filed in connection with the answers, setting forth the provisions of the certificates of incorporation and bylaws, and the applicable statutes of the State of Indiana, have no bearing upon any of the issues determined by the Appellate Court. The statutes of the State of Indiana are permissive, not mandatory. The provisions of the certificate of incorporation and bylaws are controlling. They are not in conflict with the appropriate statutes of Indiana.

It may be conceded that under the statutes of the State of Indiana, classification of directors, staggering of their terms, provisions for non-cumulative voting rights are permissible, but these can be accomplished only by

amendment to the certificate of incorporation or the bylaws, for which a two-thirds vote of the Class A stockholders would be required under the rulings of the Appellate Court.

Accordingly, this court concludes that the motion for judgment on the pleadings and for summary judgment should be granted; that the rights of the parties be declared as follows:

1. That the number of directors is fixed at thirteen.
2. That they be elected for a term of one year.
3. That their term be not staggered.
4. That cumulative voting be permitted.
5. That any of the foregoing may be changed only with the approval of two-thirds of the Class A stockholders.

Please present a formal order in conformity with the foregoing.

Yours very truly,
/s/ Samuel B. Epstein

APPENDIX C.

Decree of Superior Court of Cook County, Illinois,
case no. 58 S 18217,
entered March 27, 1962

DECREE

This cause comes on to be heard on the motions of plaintiffs for judgment on the pleadings and for summary judgment. Due and timely notice of the entry of this decree has been served upon counsel of record for defendants. The court has heretofore read and examined the pleadings and all affidavits filed herein, has heard argument of counsel, has studied the opinion heretofore rendered by the Appellate Court for the First District of Illinois in this cause (31 Ill. App. 2d 300), and has taken the matter under advisement. The court being fully advised in the premises,

The Court Finds that it has jurisdiction of the subject matter of this cause and over all parties hereto. It is accordingly

Ordered, Adjudged And Decreed that the motions of plaintiffs for judgment on the pleadings and for summary judgment shall be an each of them hereby are granted.

Now, therefore, the rights of the parties hereto are declared by the court, and it is

Ordered, Adjudged And Decreed as follows:

1. The Certificate of Incorporation of the defendant, Chicago & Eastern Illinois Railroad Co., requires that said railroad have a board of thirteen directors elected

for uniform terms of one year each with cumulative voting by shareholders.

2. The Certificate of Incorporation of said defendant, Chicago & Eastern Illinois Railroad Co., requires that the consent of holders of at least two-thirds (⅔) of the outstanding Class "A" stock shall be necessary to amend, alter or repeal said requirements of the Certificate of Incorporation regarding number of directors, election of directors as aforesaid, and the length of their term of office as aforesaid.

3. Said defendant, Chicago & Eastern Illinois Railroad Co., a corporation, its officers, directors, agents and attorneys, and each of them, shall be and they hereby are permanently enjoined and restrained from reducing the number of directors of the corporation or from changing the term of office of the directors of the corporation from the uniform period of one (1) year as aforesaid, except with the consent of the holders of at least two-thirds (⅔) of the outstanding Class "A" stock of said defendant corporation as provided in the Certificate of Incorporation thereof.

4. This decree adjudicates all claims, rights and liabilities of all parties hereto and therefore there is no just reason for delaying enforcement of or appeal from this decree.

5. This court retains jurisdiction of the parties hereto and of the subject matter hereof only for the purpose of determining the right of plaintiffs to allowance of attorneys' fees and expenses herein and for the purpose of enforcing this decree.

Enter: /s/ Samuel B. Epstein
Judge of the Superior
Court of Cook County

APPENDIX D.

Appellate Court Opinion of November 27, 1963,
Case No. 48839.

MR. PRESIDING JUSTICE SCHWARTZ DELIVERED THE OPINION OF THE COURT.

This is an appeal by defendants from a declaratory decree in a class action brought by plaintiffs as two holders of Class A stock of the defendant company, who are suing on behalf of all such stockholders. The suit concerns the validity of a bylaw designed to change and modify the rights of the Class A stockholders with respect to cumulative voting.

The case is before us for the second time, the first opinion appearing in 31 Ill. App. 2d at 300, 175 N.E.2d at 408 (1961), where the facts are fully set forth. At that time we reversed a summary decree for defendants and remanded the cause with directions. Thereafter the chancellor held further hearings and granted plaintiffs' motion for judgment on the pleadings and for summary judgments. The chancellor found that the certificate of incorporation of the defendant company required that it have a board of thirteen directors elected for uniform terms of one year each by cumulative voting by the shareholders, and further required the consent of the holders of at least two-thirds of the outstanding Class A stock to amend, alter or repeal the aforesaid provisions. The court decreed that the defendant company be restrained from reducing the number of directors of the corporation or from changing their terms of office from the uniform period of one year, except with the consent of the holders of at least two-thirds of the outstanding Class A stock.

Two days after institution of the instant suit the defendants revoked the offending bylaw and restored the provision for the annual election of all directors. Defendants contend that this made the case moot. We hold in our former opinion that the cause was not moot and that plaintiffs were not estopped because of their alleged participation and acquiescence in the illegal system of staggered elections nor because of their failure to make a formal demand. We found that the equities favored the maintenance of this suit in behalf of all Class A stockholders since one plaintiff persistently urged a change in the illegal system of voting for a period of years, and that no further demand in exhaustion of nonjudicial remedies was necessary. On this appeal the defendants still argue at length that the bylaw in question was valid, and at the same time they also argue that the case is moot. Nothing presented to us forms any basis for changing the conclusions reached in our previous opinion. Since the court was divided however on the question of mootness, we have further examined and desire to restate our position on that issue.

The continued alleged power of defendants to change the bylaws and thereby dilute the voting powers of the Class A stock distinguishes this case from cases of ordinary mootness such as arise where an event makes the subject matter of an issue no longer controversial and future litigation on the particular issue impossible or in any event remote.

The origin of the doctrine of mootness is not clear, but an examination of the available authority has helped in finding the true scope of its operation. The word "moot" originally meant "meet" or "a meeting," especially an assembly of people, as a court of adjudicature. Gradually the words came to be used in litigation as an action at

law, a plea or an accusation. It did not then have the hypothetical character it later assumed. In England it survives as the discussion of what is now called a "moot" case by students at the Inns of Court (See Oxford English Dictionary, vol. 6, p. 648 (1933)). The origin of the doctrine seems to have escaped the careful historical and analytical scrutiny of either judges or legal writers. The best explanation of its transformation from reality to the hypothetical rests, we believe, in the development or refinement of the earlier feigned or collusive suit doctrine. In those cases the courts showed an early concern for saving judicial time for real controversies and for protecting the rights of third parties whose interests might be impaired because of prior litigation.

The chronology of the earliest discovered cases in England and in this state bear out the foregoing theory. The following are feigned, fictitious or collusive cases selected for this purpose:

In *Henkin* v. *Guerss*, 12 East (K.B.) 247, 104 Eng. Rep. 97 (1810) it was held that courts of justice were constituted for the purpose of deciding really existing questions of right between the parties and were not bound to answer any impertinent question which persons thought proper to ask in the form of an action on a wager.

In *McConnell* v. *Shields*, 2 Ill. 582 (1839) the court thought that a feigned case was presented, and required proof at the next term that the case was not fictitious.

Spraggins v. *Houghton*, 3 Ill. 211 (1840) was a *qui tam* proceeding to collect a fine from a judge of election for allowing an alien to vote in the 1838 election for state and county officials. The court continued the case until further records and briefs were filed because in the form presented it was simply a fictitious suit to decide whether an alien could vote in Illinois.

People ex rel. Roberts v. *Leland*, 40 Ill. 118 (1865) was a writ of mandamus to compel the Clerk of the Superior Court of Cook County to remove the record of a case to the Supreme Court, despite the defendant's failure to furnish a revenue stamp as required by the federal act. The court held the suit was fictitious as no notice was given the plaintiff in the suit of record and it was presumably an attempt with the clerk's blessing to get a construction of the federal revenue act.

In *Washburne* v. *People ex rel. King*, 50 Ill. App. 93 (1892) an appeal from the award of a writ of mandamus to the Mayor of Chicago to issue a liquor license was dismissed as fictitious. The court found that a liquor license had already been granted and suspected that the writ was not prosecuted for any direct result, but for use that might be made of the judgment upon subsequent application for licenses.

In *Hoskins* v. *Mann*, 143 Ill. App. 49 (1908) John Henton, after retaining a life interest, conveyed certain farmland to his granddaughters. Henton then rented the property to John Hoskins. After Henton's death, Hoskins brought a bill of interpleader to determine who was entitled to the rent prior to Henton's death. The bill was dismissed as collusive, since the suit had been instituted by Hoskins at the insistence and coercion of the father of one of the granddaughters who had agreed to indemnify the plaintiff for attorney's fees, and no demand for payment of the rent claim had been made by either Henton's widow or the three grandchildren.

The foregoing cases are the progenitors of the mootness doctrine. In all of them it was the lack of a genuine controversy between the parties that was stressed.

The contemporary application of the doctrine as a matter of policy should be considered in the light of the

recent adoption of procedures designed to resolve disputes by means of declaratory judgment proceedings, even though no present issue demands a judgment or decree other than one settling the legal questions involved. The question of when an actual controversy exists for purposes of declaratory judgment proceedings is analogous to the problem of determining when a controversy is or is not moot. An examination of the case of *Elward* v. *Peabody Coal Co.*, 9 Ill. App. 2d 234, 132 N.E. 2d 549, illustrates this point. There, a shareholder sued the corporation and seven directors to set aside a stock option granted one director, because the option agreement violated the statutory provision requiring the option purchase price to be greater than the par value. *Even though the director had not yet exercised or declared his intention to exercise his option,* the court found that an actual controversy existed, since at the time of the trial the market value of the stock was double the option price and the defendant corporation was contending for the legality of the option. The court was willing to draw an inference from the facts that certain future events would occur which would make the controversy real and not moot. In the instant case, it is just as reasonable to believe that the board of defendants of the defendant company will again adopt a bylaw diluting the voting rights of Class A shareholders. The inference is even stronger when the past action of the corporation and the zeal with which it persists in asserting its right to change the bylaws are taken into account.

The federal courts have refused to apply the doctrine of mootness in cases involving short term provisional orders of federal regulatory agencies relating to rates and regulations. In such cases the litigation between the government and the parties often extends beyond the period

of the short term orders allowing temporary rates and laying down temporary regulations; that is, these provisional orders often expire before final review is obtainable by either side. Nevertheless, it is held that such a case does not become moot after expiration of the fixed period because of the reasonable possibility that the order will be renewed. *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission*, 219 U.S. 498 (1911). That was an action to enjoin an order requiring the plaintiff to cease granting preferences to a shipper for a period of two years, although the order had expired. The United States Supreme Court held that it had authority to adjudicate the controversy, despite the expiration of the specific order on which the issue was joined, saying:

> "The questions involved in the orders of the interstate Commerce Commission are usually continuing (as are manifestly those in the case at bar) and their consideration ought not to be, as they might be, defeated, by short term orders, capable of repetition, yet evading review, and at one time the Government and at another time the carriers have their rights determined by the Commission without a chance of redress." P. 515.

The same principle has been applied in cases involving rate orders, *Southern Pacific Co.* v. *I.C.C.*, 219 U.S. 433 (1911) processing quotas, *Gay Union Corp.* v. *Wallace*, 112 F. 2d 192 (D.C. Cir., 1940); agricultural marketing orders, *Yarnell* v. *Hillsborough Packing Co.*, 70 F. 2d 435 (5th Cir., 1934); and military exclusion orders, *Ebel* v. *Drum*, 55 F. Supp. 186 (Mass., 1944).

The most comprehensive study of this aspect of mootness we have been able to find is an article entitled "Federal Jurisdiction to Decide Moot cases," 94 U. of Pa. Law Review 125 (1945), (author Sidney Diamond, then Special Assistant to the Attorney General of the United States).

This reveals the broad boundaries within which the court may take a case, even though the judgment will not determine property rights or assess damages. The author sets forth what appear to be sound and reasonable tests to apply where the issue of mootness is raised. These are—the defendant's continued assertion of the legality of the discontinued acts; the defendant's discontinuance of the acts before or after the institution of suit; the defendant's motive or intent in discontinuing the acts; and the public interest involved in having the particular issue determined. The foregoing tests are all applicable to the pattern of the case before us, as an examination seriatim will reveal.

With respect to the continued assertion of legality, nearly half of a 75-page brief is devoted by defendants in the instant case to arguing the validity of the bylaw they have repealed, and a substantial portion of their oral argument was also devoted to the same proposition. They have not only argued its legality, but also its *desirability*.

The second test of mootness, that the acts complained of were not discontinued until after litigation was threatened or commenced, is also applicable. The instant suit was instituted two days before repeal of the bylaw, and defendants were aware that plaintiff Kern had left the date of institution of his suit to his Chicago attorney. Although defendants claim they were unaware of the institution of the suit at the time of the repeal of the bylaw, the reasonable inference from these facts is that defendants would not have acted without the pressure applied by plaintiff Kern.

The motive or intent of the defendant in discontinuing the acts sought to be enjoined is the third condition set out in the article. The only reasonable conclusion from the facts before us is that it is the defendant railroad's intent at some opportune time to repeal the bylaw.

The factor of the public interest involved is a fourth item to be considered in determining whether the court will hear the case. Illinois courts recognize that there is a public interest exception to the doctrine of mootness. *People ex rel. Wallace* v. *Labrenz*, 411 Ill. 618, 104 N.E. 2d 769. The Chicago and Eastern Illinois Railroad is a large public service corporation. Its stock is listed on the New York Stock Exchange. There is a wide general interest in the stability of preferred stock, and efforts to eliminate preference have been the subject of much litigation. Cf. *Bowman* v. *Armour & Co.*, 17 Ill. 2d 43, 160 N.E. 2d 753. The interest of preferred shareholders generally is sufficient, in our opinion, to establish the public interest in this case, even though the particular stock may not have a large general distribution.

It is our conclusion that mootness is not a defense of merit which may be raised by defendants to defeat the immediate litigation. Rather, mootness is a doctrine which the court imposes for its own protection, and it will not be applied where it is apparent that the controversy is a genuine one concerning valuable rights and where the party defending maintains that it still has the power to annul those rights and to recreate the condition as it existed at the time the litigation was commenced. The suit is not moot, and the controversy is a proper one for declaring the rights of the plaintiffs and for the granting of equitable relief.

The other legal conclusions of this court in its first opinion consitituted the law of the case and will not again be considered. *Seaburg* v. *Williams*, 23 Ill. App. 2d 25, 161, N.E. 2d 576; *Crozier* v. *Freeman Coal Mining Co.*, 363 Ill. 363, 2 N.E. 2d 293; *People ex rel. Kastning* v. *Militzer*, 301 Ill. 284, 133 N.E. 761. Certain factual questions arose after remandment, however, and will now be considered.

Plaintiffs filed two motions in the trial court. The first was for judgment on the pleadings, and accordance with Section 45(5) of the Civil Practice Act (Hl. Rev. Stat., ch. 110, §45(5) (1961)), and the second, a renewal of plaintiffs' motion for summary judgment filed in the proceedings, which resulted in the first appeal. Thereafter, defendants filed two affidavits of significance in opposition to plaintiffs' motions. The first was an affidavit of Clair M. Roddewig, former president of defendant railroad company. It confirmed that Roddewig had had conferences with Kern, one of the plaintiffs, as Kern's affidavit stated. Roddewig denied that Kern had ever told him he considered the disputed method of electing members of the board of directors illegal. Defendants argue that in this appeal their answer and affidavits must be given controlling weight and that they make a case of estoppel in the maintenance of this suit.

It is true that an affidavit in support of a motion for summary judgment will be strictly construed and that it must leave no question as to the movant's right to judgment, whereas the opposing party's affidavit will be construed liberally. *Tansey* v. *Robinson,* 24 Ill. App. 2d 227, 164 N.E. 2d 272 and the authorities therein collected. If the allegations made by Kern respecting conversations between Roddewig and himself (which were controverted by Roddewig's affidavit) were the sole evidence of Kern's protests concerning the illegality of the staggered system of elections and his efforts for restoration of cumulative voting, perhaps there would have been an issue of fact requiring resolution by trial. There were however as noted in our previous opinion, other specific requests by Kern to correct the method of electing directors (31 Ill. App. 2d 300, 311) and these still remain undenied.

The affidavit of Frank F. Vesper, general solicitor of the defendant railroad, was filed, setting forth certain sections of Indiana law relating to railroads. In our opinion the trial court correctly ruled that these sections are permissive rather than mandatory, and that they did not raise any questions of law or fact. Even if we held that the Indiana statutes were mandatory rather than permissive, a conflict exists between Sections 55-206 and 55-208 of the Indiana Statutes (Burn's Statutes Annotated, (1955)). Section 55-206 states:

> "The directors shall hold their office for one (1) year and until others are elected in their places."

Section 55-208 states:

> "Classification of directors. It shall be lawful for the board of directors of any railway company whose road passes through this state into adjoining states, by lot or otherwise, to so classify the members thereof, that one-fourth (¼) (as near as may be) shall terminate their official terms as directors at the first annual election thereafter; and one-fourth (¼) at each subsequent election; and after being thus classified, the stock and bondholders shall elect only the number of the board of directors necessary to fill the vacancies created by the expiration of the period of service fixed as aforesaid."

The defendant railroad argues that a reasonable reading of the words "each subsequent election" appearing after the words "first annual election," is that each subsequent election is an annual one and therefore a reasonable construction of the two sections would be that all directors are elected for one year, except where there are provisions for the staggered election of directors under Section 55-208, in which case there is an implied four-year

term for each director. This is reading into the statute a provision which is not there. In any event, it appears clear to us that the provision is not mandatory and the defendant railroad company is not required to violate its commitments to its Class A stockholders.

The decree of the trial court is affirmed.

DECREE AFFIRMED.

McCORMICK, *J.*, concurs.

DEMPSEY, *J.*, specially concurring:

An important question in the previous appeal, bearing on the issue of mootness, was whether the controversy between the parties over the method of electing directors was permanently ended. A corollary question was whether the defendants had modified the method in good faith or whether it was done in an attempt to weaken the plaintiffs' suit. The defendants asserted that they made the change without knowing that the suit had been started two days before. Although they defended the validity of the bylaw under which the directors had been elected, they argued that the case was moot because the bylaw had been amended. I assumed that the amended bylaw would stand and that the controversy was ended. I stated that I did not "believe that we should render a judgment just to discourage a possible reversion to the former method of electing directors."

I am now disturbed by the persistence of the defendants in insisting that the former bylaw was proper. This court was unanimous in holding that it was invalid, but the issue has been raised again and is reargued with unrelenting determination. The tenacity of the defendants on this subject casts doubt on their former good faith and

their future intention; there seems to be more than just a possibility that the defendants may revert to the former method of electing directors if a time to do so becomes propitious.

I also said in the dissent that in my opinion the case was not of such public interest as to justify an exception to the criteria applicable to cases which are otherwise moot. I am still inclined to this view. However, because of the doubt created by the defendants themselves, I must conclude that the substantive issue between the parties is not interred. This consideration outweighs my reservation as to the lack of public interest. I, therefore, concur in the opinion of my colleagues.

APPENDIX E.

Judgment of Supreme Court of Illinois
Denying Petition for Leave to Appeal

UNITED STATES OF AMERICA

State of Illinois }
Supreme Court } ss.

At a Term of the Supreme Court, begun and held in Springfield, on Monday, the ninth day of March in the year of our Lord, one thousand nine hundred and sixty-four, within and for the State of Illinois.

PRESENT: RAY I. KLINGBIEL, CHIEF JUSTICE

JUSTICE JOSEPH E. DAILY
JUSTICE HARRY B. HERSHEY
JUSTICE ROY J. SOLFISBURG, JR.
JUSTICE WALTER V. SCHAEFER
JUSTICE BYRON O. HOUSE
JUSTICE ROBERT C. UNDERWOOD

WILLIAM G. CLARK, ATTORNEY GENERAL
ROBERT G. MILEY, MARSHAL

ATTEST: MRS. EARLE BENJAMIN SEARCY, CLERK

Be It Remembered, that, to-wit: on the 16th day of March 1964, the same being one of the days of the term of Court aforesaid, the following proceedings were, by said court, had and entered of record, to wit:

Paul J. Kern and Irving M. Lesch, Respondents vs. Chicago and Eastern Illinois Railroad Co., an Indiana corporation, Alfred MacArthur, David O. Mathews and F. S. Yantis, Petitioners	Petition for Leave to Appeal from Appellate Court First District 558 S 18217 48839

And now on this day the Court having considered the Petition for Leave to Appeal herein as well as the record and abstract, filed in support thereof, and being now fully advised of and concerning the premises, doth overrule the prayer of the petition and denies Leave to Appeal herein.

And it is further considered by the Court that the said Respondents recover of and from the said Petitioners costs by them in this behalf expended, to be taxed, and that they have execution therefor.

I, Mrs. Earle Benjamin Searcy, Clerk of the Supreme Court of the State of Illinois and keeper of the records, files and Seal thereof, do hereby certify that the foregoing is a true copy of the final order of the said Supreme Court in the above entitled cause of record in my office.

In Witness Whereof, I have hereunto subscribed my name and affixed the Seal of said court this 16th day of March, 1964.

Mrs. Earle Benjamin Searcy, Clerk /s/
Supreme Court of the State of Illinois.

APPENDIX F.

Reorganization Plan of Chicago & Eastern Illinois Railway Company

AMENDATORY ORDER.

At a Session of the Interstate Commerce Commission, Division 4, held at its office in Washington, D.C., on the 20th day of January, A.D. 1939.

FINANCE DOCKET NO. 9952.
CHICAGO & EASTERN ILLINOIS RAILWAY COMPANY
REORGANIZATION.

Upon consideration of the matters and things involved in this proceeding and of the petition filed by the Chicago and Eastern Illinois Railway Company on December 22, 1938, for modification of the report and order entered in this proceeding on November 4, 1938, and upon investigation of the matters and things involved in the petition, and the division having, on the date hereof, made and filed a report on further consideration containing its findings of fact and conclusions thereon, which report is hereby referred to and made a part hereof:

It is hereby ordered, That the order dated November 4, 1938, approving a plan of reorganization of the Chicago and Eastern Illinois Railway Company, be, and it is hereby, modified, and the following modified plan of reorganization be, and it is hereby, approved:

A. The effective date of the plan shall be January 1, 1937.

B. All of the property of the debtor shall be transferred to it with its articles of incorporation appropriately amended or to a new corporation or subsidiaries formed for this purpose under the corporate laws of such state or states as shall be necessary in order to put into effect and carry out the plan.

C. The capitalization of the reorganized company, after consummation of the plan, shall, in addition to equipment-trust certificates then outstanding, be substantially as follows: Evansville Belt Railway Company bonds $142,000; prior-lien bonds $11,159,000 (plus such additional prior-lien bonds as may be pledged with the Reconstruction Finance Corporation in accordance with Section O hereof), out of an authorization of $20,000,000; income bonds $15,354, 500; and preferred stock $15,354,500, out of an authorization of $20,000,000; and no-par-value common stock 343,297 shares, out of an authorization of 1,000,000 shares.

D. Claims entitled to priority over existing mortgages, if any, which are proved and allowed by the court, shall be paid in full in cash without interest within 120 days after consummation of the plan.

E. Equipment-trust certificates of series A, B, and C, outstanding at the time of the consummation of the plan, shall be assumed by the reorganized company.

F. The trustee's certificates outstanding at the time of the consummation of the plan shall be paid in full in cash, including unpaid interest thereon to the date of payment.

G. Evansville Belt Railway Company bonds, $142,000, shall be assumed by the reorganized company, but each holder may, at his option, within 60 days after the consummation of the plan, surrender his bonds and receive

cash to the amount of the principal and the unpaid interest thereon to date of payment. Such payments of cash shall be made within 120 days after consummation of the plan. Bonds surrendered shall be canceled.

H. First consolidated mortgage bonds, $2,736,000, shall be paid in cash, including unpaid interest thereon at the rate of 4 percent per annum from October 1, 1934, to the date of payment. Payments shall be made to the trustee under the first consolidated mortgage within 60 days after consummation of the plan and the funds so paid shall be distributed by such trustee upon surrender of the bonds, which shall be canceled.

I. Indebtedness to The Railroad Credit Corporation shall be paid in cash, including unpaid interest to the date of payment. Payment shall be made within 60 days after the date of consummation of the plan.

J. Indebtedness to the Reconstruction Finance Corporation shall be satisfied by the issue of new prior-lien bonds, series A, of a face amount equal to the principal amount of the indebtedness. Interest on the indebtedness after April 18, 1933, shall be computed at the following rates: From April 19, 1933, to June 30, 1933, inclusive, at 5½ percent per annum; from July 1, 1933, to October 31, 1933, inclusive, at 5 percent per annum; and from November 1, 1933, to December 31, 1936, inclusive, at 4 percent per annum. To the extent that the amount of interest so computed exceeds the amount of interest heretofore paid on such indebtedness, it shall be paid by the issue of new prior-lien bonds, series A, of a face amount equal to the amount of interest to be paid. Only $1,000 bonds shall be issued, and any fractional part of $1,000 shall be paid in cash. The bonds shall draw interest from January 1, 1937.

Series-A bonds will be issued to the Reconstruction Finance Corporation, if it will accept them, in payment of any actual and reasonable expenses, including reasonable attorney's fees, incurred by it in connection with the proceeding and plan, in the amount allowed by the court, within the maximum limit fixed by us, to the extent of the nearest thousand dollars within the amount allowed, at par and accrued interest from the last interest payment date immediately preceding the actual date of issue, such bonds not to bear interest prior to said last interest payment date immediately preceding the actual date of issue.

K. All of the securities pledged as collateral for loans to The Railroad Credit Corporation and the Reconstruction Finance Corporation shall be surrendered and the old prior-lien bonds so pledged shall be canceled.

L. All claims of the general-mortgage bondholders on account of principal and interest on the general-mortgage bonds shall be satisfied by: (a) paying the odd $36 in cash without interest; (b) by exchanging the remaining principal amount of $30,709,000 for 50 percent in new income-mortgage bonds and 50 percent in new preferred stock; and (c) by issuing for the unpaid interest on each $1,000 bond four shares of new no-par-value common stock.

M. The claims of holders of old preferred stock, including claims for cumulations of dividends, shall be satisfied by the issue of one share of new no-par value common stock for each share of old preferred stock, such common stock to be issued to each holder of old preferred stock within 60 days after delivery by such holder to the reorganized company of the share certificates evidencing his ownership.

N. Contracts made by the trustee in pursuance of his duties as trustee, and executory contracts made by the

debtor not disaffirmed by the trustee and not by their terms terminating at or prior to the conclusion of the reorganization proceeding, shall be assumed by the reorganized company except that obligations, if any, now the subject of litigation shall be assumed by the reorganized company only to the extent that a claim is finally established. Obligations of other companies, guaranteed by the debtor, shall be assumed by the reorganized company. Other claims, liabilities, or obligations not otherwise provided for and recognized as valid by the court, shall be assumed by the reorganized company, and current operating expenses authorized by the court, and expenses of reorganization allowed as provided in section 77 of the Bankruptcy Act, shall be paid in full in cash by the trustee or by the reorganized company, as the court may direct.

O. New prior-lien bonds dated January 1, 1937, to mature January 1, 1967, and bearing interest at the rate of 4 percent per annum payable semi-annually, shall be issued by the reorganized company. The authorized amount of such bonds shall be $20,000,000, of which there shall be immediately issued not in excess of $11,159,000 plus bonds necessary to refund Evansville Belt Railway Company bonds, plus bonds that may be issued to the Reconstruction Finance Corporation in payment of any actual and reasonable expenses including reasonable attorneys' fees. The bonds shall be secured by a mortgage which shall constitute a lien subordinate only, as to the properties respectively covered thereby, to the liens securing the Evansville Belt Railway Company mortgage bonds, the trustees' 3½ percent equipment-trust certificates, and the debtor's 5-percent equipment-trust certificates, upon all property acquired by the reorganized company from the trustee in the proceedings, and upon all other property acquired by the new company at any time in the future, subject to pro-

visions with respect to the sale of collateral; provided that the lien of such mortgage shall be subordinate to the title of any owner, whether as trustee or otherwise, to equipment leased or conditionally sold to the debtor, or the trustee in the proceedings, or the reorganized company.

Appropriate provision shall be made in the mortgage to enable the reorganized company at its option to sell free of the lien of the mortgage or to abandon any property covered by the mortgage. The proceeds of sale of any equipment may be used by the reorganized company for any proper purpose without any obligation to account therefor under the mortgage; the proceeds of sale of any property other than equipment shall, subject to the provisions hereinafter set forth with respect to the sale or exchange of the Chicago Heights Terminal Transfer Railroad Company stock, be paid to the trustee under the mortgage and shall be subject to withdrawal by the reorganized company for use in payment for additions and betterments or for the retirement and cancellation of new prior-lien bonds. The reorganized company shall covenant to maintain sufficient equipment to enable it to operate the road efficiently and properly but shall not otherwise be obligated to replace any equipment or other property. The mortgage shall provide that all new prior-lien bonds shall be equally secured by it regardless of differences in the time of issue or in the maturity dates of such bonds.

As additional security for the new prior-lien bonds there shall be pledged with the trustee under the mortgage the entire capital stock (5,000 shares) of the Chicago Heights Terminal Transfer Railroad Company. The reorganized company or its nominees shall be entitled to vote this stock on all matters, and the mortgage shall provide for a release of the stock from the mortgage in the event of a

merger or consolidation of the properties of the Chicago Heights Terminal Transfer Railroad Company and the reorganized company; provided, that such merger or consolidation shall be upon such terms that the properties so merged or consolidated shall be subject to the lien of the mortgage securing the new prior-lien bonds to the same extent as the property of the reorganized company prior to such merger or consolidation, subject, however, as to the property of the Chicago Heights Terminal Transfer Railroad Company, to all liens on the property of that company existing at the time of such merger or consolidation. The mortgage shall further provide that the reorganized company may sell or exchange the stock of the Chicago Heights Terminal Transfer Railroad Company at any time free of the mortgage upon the consent of a majority in amount of the holders of outstanding new prior-lien bonds, not including bonds held in sinking funds, to the making of such sale or exchange and to the proper disposition of the proceeds thereof.

The new prior-lien bonds shall be issued in series, of which series A shall be issued in an amount sufficient to fulfill the provisions of this plan which require the issue of such bonds. Provision shall be made that the acceleration of the maturity date of any series or default in the payment of any series at maturity shall operate to accelerate the maturity of all other series outstanding.

As additional security for the payment to the Reconstruction Finance Corporation of the new prior-lien bonds, series A, held by it, there shall be separately pledged with that corporation $550,000, principal amount, of Southern Illinois and Missouri Bridge Company bonds, $134,600, par value, of Fruit Growers Express Company stock, the distributive share of capital of The Railroad Credit Cor-

poration and such other collateral as we may later determine to be necessary to safeguard the reconstruction loan under the conditions as they may exist when the loan is approved under the provisions of section 5 of the Reconstruction Finance Corporation Act. The reorganized company shall be privileged at any time, at its option, to sell all or any part of the bonds and stock so pledged. The proceeds of any such sale and the proceeds of any distribution of the distributive share of capital of the Railroad Credit Corporation shall be applied to the retirement and cancellation of new prior-lien bonds, series A, held by the Reconstruction Finance Corporation; provided, that the reorganized company at its option may apply any part of such proceeds to any capital purpose if the consent in writing of that corporation to such application be first obtained. Provision shall be made that the Reconstruction Finance Corporation shall be obligated to sell new prior-lien bonds, series A, to the reorganized company for retirement or for deposit in the sinking fund at par plus accrued interest, so long as that corporation owns any of such bonds. The reorganized company shall pay to that corporation such accrued interest out of funds other than those derived from the liquidation of the collateral hereinabove mentioned.

For the series A bonds and any bonds issued to refund such bonds there shall be a sinking fund of $75,000 for each of the calendar years 1937 to 1946, inclusive, and $110,000 a year for each of the years 1947 to 1966, inclusive. Should it be necessary to refund the new series A bonds, the reorganized company may in its discretion provide for the benefit of the refunding bonds a sinking fund not to exceed $110,000 a year after January 1, 1967, to be appropriated out of available earnings after the appropriations for additions and betterments and before

any appropriations for the sinking fund for the benefit of the income bonds hereinafter referred to. Payments shall be made into the sinking fund only to the extent that income for the purpose is available in each year and deficiencies resulting from lack of available income shall not accumulate. The fund shall be used within one year from the date of the appropriation for the purchase or redemption of such outstanding bonds. The bonds purchased or redeemed shall either be deposited in the fund or canceled. Bonds deposited shall be kept alive and shall continue to draw interest which shall be added to the fund and used for the purposes thereof. If the bonds are canceled, annual payments by the reorganized company into the fund thereafter shall nevertheless include an amount equal to interest on such canceled bonds so that the annual sinking fund payments will be the same as though the bonds had not been canceled, and the sum representing the interest on such canceled bonds shall continue to be a fixed charge upon the company, equal in rank to the interest on uncanceled bonds of the same issue. Bonds may be called by lot for redemption and cancellation, or for deposit in the sinking fund. Bonds shall be so called upon 45 days published notice at prices, together with accrued interest, of 105 until 15 years after their date, 102 thereafter and until 24 years after their date, and thereafter 101 until maturity. Bonds may also be purchased on the open market at any time either with the sinking fund or other available funds, but only if such purchase can be made at a price not in excess of the redemption price, and provided also that such bonds shall not be purchased with sinking-fund money at less than par plus accrued interest so long as any of the bonds are held by the Finance Corporation.

The balance of the new prior-lien bonds not required to be issued at series A may be issued by the reorganized

company in one or more series, and providing for a sinking fund on such series of bonds not to exceed 1 percent per annum of the face amount of bonds of the series outstanding. Such sinking fund shall be payable only to the extent earned as hereinafter provided for other bonds and shall be non-cumulative. These bonds may be issued only for the purpose of refunding Evansville Belt Railway Company mortgage bonds, new prior-lien bonds, and the bonded indebtedness of the Chicago Heights Terminal Transfer Railroad Company and against property additions to the extent of 75 percent of the cost of such additions; provided, however, that such bonds may be so issued against property additions only if the earnings of the reorganized company available for fixed interest charges, after payment of rent of leased lines, for the 12 months preceding the first day of January or of July, as the case may be, which is not less than three months next preceding the date of such issue, equal or exceed 1½ times the fixed interest charges on equipment-trust certificates, trustee's equipment certificates, Evansville Belt Railway Company bonds and new prior-lien bonds, including bonds held in sinking funds and including the bonds proposed to be issued at the time. Such bonds shall not be issued against property additions paid for out of the appropriations for additions and betterments provided for hereinafter.

P. Income bonds in an authorized amount of $15,354,500 dated January 1, 1937, and maturing January 1, 1997, shall be issued. They shall be secured by a mortgage covering the same property included in the mortgage securing the prior-lien bonds and shall constitute a lien upon such property subordinate only to the liens securing trustee's equipment certificates, equipment-trust certificates, Evansville Belt Railway Company mortgage bonds and new

prior-lien bonds; provided that the lien of such mortgage shall be subordinate to the title of any owner, whether as trustee or otherwise, to equipment leased or conditionally sold to the debtor, the trustee in the proceedings, or the reorganized company. The income bonds shall bear interest at the rate of 5 percent per annum, payable only to the extent that income is available for the purpose in accordance with provisions hereinafter stated, and deficiencies in interest from lack of income shall not cumulate. Interest on the income bonds shall be paid to the trustee under the mortgage and disbursed by the latter, but only to the extent that available funds in the hands of the trustee equal or exceed one-fourth of 1 percent interest on the outstanding bonds of the issue.

The income bonds shall have a provision that at any time prior to maturity each holder may, at his option, convert bonds held by him into new common stock on the basis of one share of stock for each $25 face amount of bonds; only whole bonds to be converted. Provision shall be made to protect the value of this conversion right against dilution resulting from the issue of additional stock by the reorganized company at a price less than $25 a share.

The mortgage securing the income bonds shall contain a provision for a sinking fund of $75,000 for each of the calendar years 1937 to 1946, inclusive, $40,000 a year for each of the calendar years 1947 to 1966, inclusive, and $150,000 a year for each of the calendar years 1967 to 1996, inclusive, but the latter amount is to be reduced to an amount not less than $40,000 a year, if it is found to be necessary to provide a sinking fund for any bonds issued to refund new prior-lien bonds, series A, the sinking fund on which would not exceed $110,000 a year. Sinking-fund appropriations shall be made only to the extent that in-

come is available for that purpose in each year, and they shall be used within one year for the purchase or redemption of income bonds, which shall be canceled.

Income bonds may, upon 90 days' notice, be called for redemption by lot at any time at par plus unpaid interest earned up to 90 days prior to the redemption date. Bonds may be purchased in the open market with the sinking fund to the extent that funds are available as herein provided, but only if such purchase can be made at a price not in excess of the redemption price. No income bonds shall be purchased or redeemed with other than sinking fund moneys so long as any of the new prior-lien bonds, series A, are outstanding.

Q. Preferred stock having a par value of $40 a share shall be issued to the amount of 383,862½ shares. The stock shall be entitled to a preferred dividend of $2 a share, payable before payment of dividends on common stock in any one year, in accordance with provisions hereafter stated. To the extent that income is available for dividends, unpaid dividends for any year shall cumulate but not otherwise. This stock shall also be entitled to a preference against assets of $40 a share plus a sum equal to the amount of all accumulated and unpaid dividends thereon.

This stock shall be subject to retirement at any time upon 90 days' notice, in any amount, at par plus a sum equal to the amount of all dividends thereon accumulated and unpaid prior to January 1 preceding the date of notice plus an amount equal to the dividends earned, as hereinafter provided, during the period from January 1 preceding the date of notice to 90 days prior to the retirement date. The shares to be so retired shall be selected by lot. This stock shall have the right of cumulative voting in the election of directors.

R. Common stock of no-par value shall be issued in the number of shares necessary to carry out the provisions of this plan, which relate to the issue of common stock of the reorganized company to holders of general-mortgage bonds and old preferred stock; plus the total number of shares necessary to provide for conversion of the income bonds. This stock shall have the right of cumulative voting in the election of directors.

S. Income of the reorganized company that is available after payment of fixed charges in any year will be applied first to an appropriation for additions and betterments on account of the preceding calendar year amounting to not more than 2 percent of railway operating revenues for that year or not more than the difference found by subtracting the unexpended accumulation of previous appropriations in the fund from $500,000, whichever is less. In determining the amount of the appropriation for additional equipment purchased, only the amount of the cash payments in each year for such equipment shall be considered. After the appropriation for additions and betterments, the remaining available income of the preceding calendar year will be applied to sinking-fund appropriation up to $150,000 a year for the new prior-lien bonds, series A, bonds issued to refund those bonds and for income bonds, but deficiences in available income shall not accumulate. During the 10 calendar years, 1937 to 1946, income available for sinking fund appropriations, as aforesaid, shall be applied one-half to the sinking fund for new prior-lien bonds, series A, and for any bonds issued to refund new prior-lien bonds, series A; and one-half to the sinking fund for income bonds. Thereafter income available for sinking fund appropriations, as aforesaid, shall be applied first to the sinking fund appropriation for the new

prior-lien bonds, series A, and for any bonds issued to refund new prior-lien bonds, series A; and then to the sinking fund appropriation for the income bonds. The remaining available income will be applied to interest on the income bonds up to the full amount thereof. After full interest requirements on the income bonds have been met the income will be applied to sinking fund requirements, if any, of additional series of new prior-lien bonds, other than series A, before any balance remaining is to be available for dividends on new preferred stock. Any balance then remaining shall be deemed to be available for dividends on the new preferred stock, but the declaration of such dividends shall be in the sole discretion of the board of directors of the reorganized company.

If the new company shall make any charges for depreciation of road, the amounts so charged, to the extent that they are available therefor, shall be used for the purposes of the additions and betterments fund and the sinking funds, and to the extent so used shall be credited first to the payments herein required for the additions and betterments fund and then to the payments herein required for sinking funds, and the charges for said funds out of income for the year in which such depreciation was charged shall be reduced accordingly.

Appropriations for additions and betterments and sinking funds and the payment of interest on the income bonds shall begin as of April 1, 1938, on account of the year 1937, if funds are available as heretofore specified. Any appropriations or payments which by the terms of the plan are required to be made on a date which is prior to the date of consummation of the plan shall be made as promptly as is reasonably possible after the date of consummation.

T. The plan provides for obtaining approximately $5,000,000 of new money, and funds to repay the existing

obligation to the Reconstruction Finance Corporation either from the Reconstruction Finance Corporation or through private channels through the sale of new prior lien bonds and the pledge of certain securities. On bonds issued for new money interest shall accrue from the last interest payment date immediately preceding the actual date of issue. In the event that the financing must be done through the Reconstruction Finance Corporation the matter shall be raised seasonably by the proper party in a separate proceeding under section 5 of the Reconstruction Finance Corporation Act so that this Commission may act upon it immediately upon confirmation of the plan of reorganization. The terms of such financing including the collateral security required, will be considered and disposed of in that proceeding. Submission of the plan to the stockholders and creditors shall be contingent upon receipt by this Commission within 30 days after approvial of the plan by the Court of a tentative commitment to supply the funds.

U. The reorganized company will assume the liability for, and will pay in due course, any and all taxes due to the United States from the debtor or the trustee, for any taxable period prior to the date of confirmation of this plan of reorganization, without requiring proof thereof in this proceeding and without prejudice by reason of not having been proven herein.

V. The construction of the plan by the court shall be final and conclusive. The court may cure any defect, supply any omission, or reconcile any inconsistency, in such manner or to such extent as may be necessary or expedient to carry out the plan effectively.

W. Except as otherwise provided herein, the means for executing the plan and all details of its consummation, not otherwise provided for, shall be put into effect and

carried out by the debtor. For this purpose, reorganization managers shall be appointed, consisting of Kenneth D. Steere, chairman of the board of directors of the debtor, Carrol M. Shanks, chairman of the general-mortgage bondholders committee, and one person to be designated by Steere and Shanks subject to the approval of the Reconstruction Finance Corporation. The terms of any solicitation of deposits of securities or authorizations to represent any creditor or shareholder of the debtor in the execution of the plan on the part of the debtor or the reorganization managers shall be subject to our prior approval.

X. Upon consummation of the plan the reorganized company shall have a board of directors consisting of 13 members. The term of office of each director shall be one year. The initial board of directors shall be chosen as follows: Kenneth D. Steere shall name five; Carrol M. Shanks shall name five; and the Reconstruction Finance Corporation shall name three. So long as the Reconstruction Finance Corporation holds not less than $1,000,000, face amount, of the new prior-lien bonds, series A, issued to it pursuant to the plan, the selection of three members of each succeeding board of directors shall be subject to its approval.

In the event that financing through the Reconstruction Finance Corporation is not consummated, and the new prior-lien bonds are sold to other parties, the new owners of a majority of such bonds shall have the privilege of naming three members of the initial board of directors.

Y. Acceptance of the plan shall include acceptance of the provisions of the new bonds, mortgages, and stock certificates and all instruments necessary and appropriate to the carrying out of the plan, other than the orders of the

court and this Commission, to the same effect as though the terms of such instruments were set forth in full herein.

Z. The carrying out of the plan shall be as provided in the Bankruptcy Act.

IT IS FURTHER ORDERED, That the authorization and approval herein granted by this Commission are upon the condition that the journal entries covering the necessary accounting adjustments under this order will be submitted to the Bureau of Accounts of this Commission for approval before they are recorded on the books of the debtor under the plan of reorganization herein approved.

IT IS FURTHER ORDERED, That nothing herein contained shall be, or be construed as, a grant of authority for the issuance of any securities, assumption of obligations, transfer of any property, sale, consolidation, or merger of the debtor's property, or pooling of traffic, pursuant to either the Bankruptcy Act or the Interstate Commerce Act, except as provided herein, or until further action by this Commission upon confirmation of the plan by the court.

By the Commission, division 4.

W. P. BARTEL,
Secretary.

(SEAL)

A True Copy.

W. P. BARTEL,
Secretary of The Interstate Commerce Commission

APPENDIX G.

Article IV, Section 1, Constitution of the United States

"Section 1. Full Faith and Credit shall be given in each State to the public Acts, Records, and Judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."

Article XI, Section 3, Constitution of the State of Illinois:

"§3. The general assembly shall provide, by law, that in all elections for directors or managers of incorporated companies, every stockholder shall have the right to vote, in person or by proxy, for the number of shares of stock owned by him, for as many persons as there are directors or managers to be elected, or to cumulate said shares, and give one candidate as many votes as the number of directors multiplied by the number of his shares of stock shall equal, or to distribute them on the same principle among as many candidates as he shall think fit; and such directors or managers shall not be elected in any other manner."

APPENDIX H.

Statutes of State of Indiana

Burns Annotated Indiana Statutes, 1963 Cumulative Pocket Supplement, 1951 Replacement Volume, §55-206:

"§55-206 [12863]. Election of directors—Qualifications and terms. There shall be an annual meeting of the stockholders (to be held in one [1] of the counties in which or through which such road is proposed to be or may be constructed) for the election of directors to serve for the ensuing year, notice of which, appointing a time and place be given by the directors chosen as provided in the first section [§55-201] of this act for the first annual election, and, afterward by their successors in office; which notice shall be published not less than twenty [20] days previous thereto in a newspaper published in each county through which such road shall be intended to run (if there be stockholders residing therein) in which a newspaper shall be published; and if no newspaper be published therein, then by six [6] written or printed notices put up in the most public places in such county: Provided, however, That the directors may prescribe by by-law a place outside the state for the holding of annual meetings, or, notwithstanding the limitation of section 9 [§55-209] of this act, by resolution adopted at any meeting by stockholders holding shares representing two-thirds [⅔] of the voting power of the capital stock entitled to vote at any annual meeting. Three [3] judges of election shall be chosen by the board of directors previous to any annual meeting of the stockholders, who shall be stockholders but not directors at the time of such election, whose duty it shall be to receive the votes of the stockholders at such election for

directors, and who shall openly count the votes and declare the result, and shall furnish the directors elected at such meeting of the stockholders with a certificate of their election, which certificate shall be evidence of their authority to act as such directors. Not less than seven [7] nor more than thirteen [13] directors shall be chosen at such meeting of stockholders, by ballot, and by a majority of the votes of the stockholders present in person or by proxy. No person shall be a director unless he shall be a stockholder, owning stock absolutely in his own right, and qualified to a vote for directors at the election at which he shall be chosen. The directors shall hold their office for one [1] year and until others are elected in their places. [1 R.S. 1852, ch. 83, An act to provide for the incorporation of railroad companies, §4, p. 409; as amended Acts 1933, ch. 101, §8, p. 683 and Acts 1955, ch. 139 §1, p. 282.]

Burns Annotated Indiana Statutes, 1951 Replacement Volume, §22-207:

55-207 [12864]. Number of directors.—The stockholders of any railroad company heretofore incorporated in this state, or that may be hereafter incorporated, may, by the vote of a majority in interest of the stockholders of such company, at any annual or other meeting thereof, determine that the directors of said company shall consist of any number not less than five [5] nor more than thirteen [13], who shall be chosen from any of the stockholders; and thereafter such company may elect from any of its stockholders the number of directors it has fixed and determined upon as aforesaid, in the same manner and with the same effect as if this section was contained in the original act incorporating such company. [1 R.S. 1852, ch. 85, An act to authorize railroad companies to increase the amount of their capital stock and to increase the number of their directors, §2, p. 423.]

Burns Annotated Indiana Statutes, 1951 Replacement Volume, §22-208:

55-208 [12865] Classification of directors.—It shall be lawful for the board of directors of any railway company whose road passes through this state into adjoining states, by lot or otherwise, to so classify the members thereof, that one-fourth [¼] (as near as may be) shall terminate their official terms as directors at the first annual election thereafter, and one-fourth [¼] at each subsequent election; and after being thus classified, the stock and bondholders shall elect only the number of the board of directors necessary to fill the vacancies created by the expiration of the period of services fixed as aforesaid. [Acts 1869 (Spec. Sess.), An act authorizing the classification of the board of directors of railroad companies, ch. 50, §1, p. 103.]

Indiana Statute, S. 133, approved February 23, 1939: Burns Annotated Indiana Statutes, 1951 Replacement Volume, §§2209-2210:

55-2209. Sale or reorganization under court authority. —In case of the sale of any railroad and its property, under or by the authority of any competent court or courts (part of which railroad may be situate within the state of Indiana and part situate in an adjoining state, and embraced in the mortgage or mortgages or deed or deeds of trust), it may be sold at one [1] time and place, as an entirety, at such point on the line of said railroad either within or without the state, and upon such notice, as the court or courts ordering such sale may direct.

In case of the reorganization of any railroad and its property under or by the authority of any competent court or courts of the United States in a proceeding for the reorganization of a railroad pursuant to section 77 of the

Act of Congress of July 1, 1898, entitled "An act to establish a uniform system of bankruptcy throughout the United States," as amended (only a part of which railroad need be situate within the state of Indiana), the corporation to which all or any part of said railroad and its property may be transferred by or pursuant to an appropriate order or decree of said court or courts may be a corporation organized under this act and having all of the powers, rights, privileges, immunities, and franchises provided in this act. [§§55-2209 - 55-2215].

This act is hereby declared to apply to and embrace any and all rights or purchases of railroads their franchises, rights and privileges, under judicial decrees, or judgments of any of the courts of the state of Indiana, or of the United States, at any time, whether said sale under such decrees or judgment, may have occurred before or after the passage of said act. [§§55-2209 - 55-2215]. [Acts 1945, ch. 202, §1, p. 659.]

55-2210. Incorporation by purchasers or reorganizers.— In case of the sale of any railroad and its property (situated wholly or partly within this state, or situated partly in this state and partly in an adjoining state) by virtue of any mortgage or mortgages or deed or deeds of trust, either by foreclosure or other judicial proceedings, or pursuant to any power contained in such mortgage or mortgages or deed or deeds of trust, or by the joint exercise of said powers and authorities, the purchaser or purchasers thereof, their survivors or survivors, or he or his or they or their associates or assigns, may form a corporation by filing in the office of the secretary of state a certificate specifying the name and style of the corporation, the number of directors, the names of the first directors and the period of their service (not exceeding one [1] year),

the amount of original capital, and the number of shares into which said capital is to be divided; and in case of the reorganization of any railroad and its property (situated wholly or partly within this state and whether owned prior to the reorganization proceedings by a corporation of this state or by a corporation of another state) in a proceeding under section 77 of the Act of July 1, 1898, entitled "An Act to establish a uniform system of bankruptcy throughout the United States," as amended, any three [3] or more persons, being either directors or officers of the railroad, may form a corporation by filing in the office of the secretary of state a certificate specifying the name and style of the corporation. the number of directors, the names of the first directors and the period of their service (not exceeding one [1] year), the amount of original capital, and the number of shares into which said capital is to be divided; and the persons signing said certificate, and their successors, shall be a body corporate and politic, by the name in said certificate specified, with power to sue and be sued, contract and be contracted with, and maintain and operate the railroad in said certificate named, and transact all business connected with same; and a copy of such certificate, attested by the signature of the secretary of state or his deputy, shall, in all courts and places, be evidence of the due organization and existence of the said corporation and of the matters in said certificate stated. [Acts 1945, ch. 202, §2, p. 659.] [Acts 1865, ch. 20, An act to authorize, regulate and confirm the sale of railroads, to enable purchasers of the roads to form corporations and to exercise corporate powers, and to define their rights, powers and privileges; to enable such corporations to purchase and construct connecting and branch roads, and to operate and maintain the same. §§1 and 2, p. 66, as amended, Acts 1939, ch. 18, §§1 and 2, p. 659.]

APPENDIX I.

Section 77(f) of Bankruptcy Act

11 U.S.C. § 205(f) (Supp V to 1934 ed.):

§ 205(f)—Binding effect of confirmation; discharge of debtor from liabilities; issuance of securities.

Upon confirmation by the judge, the provisions of the plan and of the order of confirmation shall, subject to the right of judicial review, be binding upon the debtor, all stockholders thereof, including those who have not, as well as those who have, accepted it, and all creditors secured or unsecured, whether or not their claims shall have been filed, and, if filed, whether or not approved, including creditors who have not, as well as those who have, accepted it. Upon confirmation of the plan, the debtor and any other corporation or corporations organized or to be organized for the purpose of carrying out the plan, shall have full power and authority to, and shall put into effect and carry out the plan and the orders of the judge relative thereto, under and subject to the supervision and the control of the judge, the laws of any State or the decision or order of any State authority to the contrary notwithstanding. The Property dealt with by the plan, when transferred and conveyed to the debtor or to the other corporation or corporations provided for by the plan, or when retained by the debtor pursuant to the plan, shall be free and clear of all claims of the debtor, its stockholders and creditors, and the debtor shall be discharged from its debts and liabilities except such as may consistently with the provisions of the plan be reserved in the order confirming the plan or directing such transfer and conveyance or retention, and the judge may

require the trustee or trustees appointed hereunder, the debtor, any mortgagee, the trustee of any obligation of the debtor, and all other proper and necessary parties, to make any such transfer or conveyance, and may require the debtor to join in any such transfer or conveyance made by the trustee or trustees. Upon the termination of the proceedings a final decree shall be entered discharging the trustee or trustees, and making such provisions as may be equitable, by way of injunction or otherwise, and closing the case. Upon confirmation of a plan, the Commission shall, without further proceedings, grant authority for the issuance of any securities, assumption of obligations, transfer of any property, sale, consolidation or merger of the debtor's property, or pooling of traffic, to the extent contemplated by the plan and not inconsistent with the provisions and purposes of chapter 1 of Title 49 as on August 27, 1935, or thereafter amended. The provisions of sections 77a to 77aa of Title 15 shall not apply to the issuance, sale, or exchange of any of the following securities, which securities and transactions therein shall, for the purposes of said sections, be treated as if they were specifically mentioned in sections 77c and 77d of Title 15, respectively: (1) All securities issued pursuant to any plan of reorganization confirmed by the judge in accordance with the provisions of this section; (2) all securities issued pursuant to such plan for the purpose of raising money for working capital and other purposes of such plan; (3) all securities issued by the debtor or by the trustee or trustees pursuant to subsection (c), clause (3) of this section; (4) all certificates of deposit representing securities of, or claims against, the debtor, with the exception of such certificates of deposit as are issued by committees not subject to subsection (p) of this section. The provisions of subdivision (a) of

section 78n of Title 15 shall not be applicable with respect to action or matter which is within the provisions of subsection (p) of this section. [Act July 1, 1898, c. 541, § 77; as amended Mar. 3, 1933, c. 204, § 1, 47 Stat. 1474; Aug. 27, 1935, c. 774, 49 Stat. 911; June 26, 1936, c. 833, 49 Stat. 1969.]

SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
JUL 1 1964
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. [redacted] 168

CHICAGO & EASTERN ILLINOIS RAILROAD CO., AN INDIANA CORPORATION, ET AL.,
Petitioners,

vs.

PAUL J. KERN AND IRVING M. LESCH,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

MAYER GOLDBERG,
33 North LaSalle Street,
Chicago, Illinois 60602,
Attorney for Respondents.

Of Counsel:
MARVIN SACKS,
33 North LaSalle Street,
Chicago, Illinois 60602.

THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963.

No. 1203.

CHICAGO & EASTERN ILLINOIS RAILROAD CO., AN INDIANA CORPORATION, ET AL.,

Petitioners,

vs.

PAUL J. KERN AND IRVING M. LESCH,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

JURISDICTION.

Respondents contend that no federal question is presented by this record. We adhere to this contention despite the fact that the pleadings filed by petitioners purport to raise questions under Section 77(f) of the Bankruptcy Act and under the full faith and credit clause of the United States Constitution.

QUESTIONS PRESENTED.

We take complete issue with the statements made by counsel for petitioners in attempting to state the questions presented. It is most respectfully urged that the questions presented by this record actually are as follows:

1. Do the articles of incorporation of petitioner Railroad authorize the Railroad to elect its thirteen directors for staggered terms without the consent of at least two-thirds of the outstanding Class A stock?

2. The statutes of Indiana merely permit but do not require staggered terms for directors of Indiana corporations. Does the decree of the Illinois Court, which construes the Railroad articles of incorporation as prohibiting staggered directors (without consent of two-thirds of the Class A stock), deny full faith and credit to these Indiana statutes?

STATEMENT OF THE CASE.

The statement submitted at page 3 of the petition goes far beyond the actual issues in this case. In fact, the only real issue here is the meaning of the articles of incorporation of the Railroad. The articles of incorporation provide:

1. All shareholders shall have the right of cumulative voting for directors (Article IV of Certificate of Incorporation at A. 143).

2. The company shall have thirteen directors with the first board to serve until May 15, 1941, for a period not exceeding one year (Article VII at A. 145, 146). Also there is another most important provision:

3. The provisions of the articles of incorporation which have reference to or which are protective of the rights and interests of the Class A shareholders cannot be amended, altered or repealed except with the consent of the holders of at least 2/3 of the Class A stock given at a meeting called for that purpose, at which the holders of the Class A stock vote separately as a class (Article IV at A. 143).

The Railroad was incorporated on June 27, 1940, in the State of Indiana. Respondent, Kern, owns 4,000 shares

of Class A stock and respondent, Lesch, owns 1,000 shares of such stock. The petitioner Railroad had uniform terms of directors until July 10, 1953, when it purported to amend its by-laws so as to provide for election of directors on staggered terms. This was done without consent of the Class A shareholders.

These proceedings were instituted in the Superior Court of Cook County on November 12, 1958. Respondents, acting as plaintiffs, sought to enjoin petitioner Railroad from electing its directors upon a staggered basis without consent of the Class A shareholders. Such relief was granted by the courts of Illinois.

The above is a sufficient statement of the case for purposes of this proceeding. The only issue in the case actually is the matter of interpretation of the articles of incorporation. All of the contentions made by petitioner as to the existence of a federal question which require decision by this court are predicated upon collateral matters which may be briefly stated as follows:

1. The plan of reorganization of petitioner Railroad was approved by the Interstate Commerce Commission and then by the United States District Court in Chicago. The plan provided that the reorganized Railroad was to have a board of directors of thirteen members with term of office of one year each. (Paragraph X of reorganization plan at App. A, page 48). However, the provisions of the plan of reorganization are not directly involved in this case in any manner. The Appellate Court for the First District of Illinois gave weight to the provisions of the plan of reorganization only because the court, "felt that the plan had a strong bearing on the proper construction and interpretation of the articles of incorporation and the by-laws". The Appellate Court expressly stated that, "the basic

document on which plaintiffs' rights must be determined, is the certificate of incorporation". (App. A at Page 11a).

2. Petitioners attempt to raise a federal question upon the full faith and credit clause of the United States Constitution. Therefore they cite and argue at great length the statutes of Indiana which permit Indiana corporations to elect directors on staggered terms (App. H at Page 51 A). However, the clear, immediate and obvious answer is that this statute of Indiana is not mandatory, but is merely permissive. Since the statute was not mandatory, there was no reason for the Appellate Court for the First District of Illinois to consider the results of its application. The statute is simply not applicable. The Appellate Court of Illinois carefully pointed this out in its second opinion (App. D at Page 29 A).

We therefore repeat that the sole and only question involved in this case is purely and simply a matter of construction of the articles of incorporation of petitioner Railroad. No other question of any kind was presented or decided and no other question actually exists in the case.

ARGUMENT.

The arguments depended upon by respondents in urging denial of the petition are therefore simple. We will summarize our arguments as follows:

The sole and central issue presented by this record is the matter of construction of the articles of incorporation. The only question is: Do the articles of incorporation of petitioner Railroad authorize it to institute staggered terms for election of its directors without consent of the Class A shareholders? The plan of reorganization is important only if it can serve as a guide to assist in obtaining the proper interpretation of the articles of incorporation.

This entire argument of petitioners is based upon the completely false assumption that the Appellate Court of Illinois used the plan of reorganization, "to fix a rule of law" (petition page 18). This assumption is totally unsupported by the record. Entirely to the contrary, the Appellate Court was most careful to point out that the plan of reorganization was of collateral importance only. The Appellate Court specifically held that (petition page 8),

> "We do not hold that the reorganization plan and agreement is now binding on defendant corporation. The basic document on which plaintiffs' rights must be determined is the certificate of incorporation."

Thus, this record contradicts the petition for certiorari and demonstrates that the plan of reorganization itself is not involved in this case. Therefore, no federal question involving the Bankruptcy Act of the United States is presented by this record. If the plan of reorganization

had never existed and if there had never been any bankruptcy proceedings, the same result would have been reached in decision of this case.

The statutes of Indiana merely give every Indiana corporation the right to provide for staggered terms of directors in their articles of incorporation. No statute gives any Indiana corporation the right to institute staggered terms for directors in contravention of its articles of incorporation and by by-laws. That is, the statutes of Indiana are not mandatory and do not require any corporation to institute staggered terms for its directors. These statutes are permissive only and they are intended to apply only when their application is not contrary to the articles of incorporation. Since the articles of incorporation expressly prevented this type of amendment to the corporate by-laws without consent of Class A shareholders, there was neither the need nor the opportunity to apply the permissive Indiana statute. It follows that the courts of Illinois have not denied full faith and credit to the Indiana statute. The statutes of Indiana merely have no bearing upon the problem presented by this record.

The above is all that is required to demonstrate that there is no federal question presented by this record. Arguments such as the merits of cumulative voting have no bearing upon the issues here. The Appellate Court of Illinois never applied any principles of Illinois constitutional law to this case. The Court patently cited *Wolfson* v. *Avery*, 6 Ill. 2d 78 only for the obvious general proposition that classified directorships and staggered elections diminish the effective voting power of minority shareholders.

The sole and only question is the right of petitioner Railroad to institute a system of staggered terms for its directors without consent of its Class A shareholders under the applicable provisions of its existing articles of in-

corporation and by-laws. It is submitted that this question has been properly decided by the courts of Illinois under applicable State law. No federal question is visible here.

CONCLUSION.

For the foregoing reasons it is respectfully urged that the petition for a writ of certiorari should be denied.

Respectfully submitted,

MAYER GOLDBERG,
33 North LaSalle Street,
Chicago, Illinois 60602,
Attorney for Respondents.

Of Counsel:
MARVIN SACKS,
33 North LaSalle Street,
Chicago, Illinois 60602.

LIBRARY

Office-Supreme Court, U.S.
FILED
JUL 15 1964
JOHN F. DAVIS, CLERK

No. [redacted] 168

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

CHICAGO & EASTERN ILLINOIS RAILROAD CO., an Indiana corporation, et al.,

Petitioners,

vs.

PAUL J. KERN and IRVING M. LESCH,

Respondents.

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

JAMES A. VELDE
JOHN K. NOTZ, JR.
33 South Clark Street
Chicago, Illinois 60603

PATRICK C. MULLEN
646 Chicago Road
Chicago Heights, Illinois
Counsel for Petitioners

Of Counsel
GARDNER, CARTON, DOUGLAS, CHILGREN & WAUD
33 South Clark Street
Chicago, Illinois 60603

July 1964

The Scheffer Press, Inc—ANdover 3-6850

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963.

No. 1203

CHICAGO & EASTERN ILLINOIS RAILROAD CO., an Indiana corporation, et al.,

Petitioners,

vs.

PAUL J. KERN and IRVING M. LESCH,

Respondents.

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Respondents' brief opposing review fails to meet petitioners' contentions.

1. Respondents repeatedly say that the sole question is the construction of petitioner railroad's articles of incorporation, a matter of state law. This, it is true, was the basic question before the Illinois courts. But the state was Indiana, not Illinois. And in deciding the question, the Illinois courts wrongly created and injected federal law into the Indiana certificate or articles of incorporation.

One federal question was the Illinois Appellate Court's finding that the federal plan of reorganization forbad staggered terms for the railroad's board of directors. This

holding under the federal bankruptcy law was then applied to the Indiana certificate of incorporation. The Illinois courts thereby disregarded relevant Indiana law as set forth in Indiana statutes. This result involved another federal issue, the violation of the Full Faith and Credit Clause of the United States constitution.

2. Respondents' entire argument is based on an assumption (p. 6) that the railroad's certificate of incorporation "expressly prevented" staggered terms for the railroad's board of directors without a ⅔ vote of the Class A shareholders. Nowhere does respondents' brief quote or cite the provision of the certificate on which they rely. There is no such provision.

3. It is noteworthy that the respondents, having obtained a declaratory judgment from the Illinois courts and wanting to avoid federal review of a federal question, say now that the provisions of the reorganization plan "are not directly involved in this case in any manner" (Brief in Opposition, p. 3). Five of the eleven paragraphs of respondents' complaint contained allegations concerning the plan of reorganization (A. 2-6), even to the extent of describing staggered terms as a "complete violation of the plan of reorganization" (A. 5). In the Appellate Court's decisive first opinion[1], 14 of the 24 paragraphs discussed or referred to the plan of reorganization (App. 1a-2a), as in the statements (ital. added):

> "The principal issue is whether that amendment is in violation of a provision for cumulative voting and annual election of all directors, as contained in *a reorganization plan, a decree of court* . . ." (App. 1a).

---

[1] The trial court's decree and the Appellate Court's second opinion held that the first opinion's ruling on the merits was the law of the case (App. 14a, 26a).

"Thus, the maximum number of directors . . . was to have been five and the minimum, four, thereby creating a system of classified directors and staggered elections and sharply qualifying or completely defeating *the cumulative voting provisions of the plan.*" (App. 2a)

"The question is whether the power of minority shareholders . . . should be diminished or extinguished in contravention of *the provisions of a plan of reorganization, a decree of court* . . ." (App. 4a).

"Defendants contend that *the plan of reorganization* . . . was not intended as a restriction extending into infinity. . . . We do not believe that *the reorganizers* so considered it when it was prepared or that *the court* had such an interpretation in mind when it was approved." (App. 5a-6a)

"Defendants further argue that there is no requirement in the certificate of incorporation inflexibly fixing the number of directors at thirteen, . . . That is drawing a farfetched inference in order to override the language to the contrary in *the plan of reorganization* . . ." (App. 6a).

"The *plan of reorganization* unconditionally fixes the term of each director at one year. There is nothing in the language of the certificate of incorporation which negates this clear and unambiguous language embodied in *the Commission order.*" (App. 7a)

"It was natural . . . that *a plan of reorganization* providing for cumulative voting should also include a provision for the election of the directors annually. Such a provision is important to the holders of stock having cumulative voting rights. Otherwise, the right is a snare and a delusion." (App. 8a)

"Defendants argue that since the certificate of incorporation provides that there be no distinction as to class in matters pertaining to the cumulative

election of directors, the Class A preferred shareholders had no rights peculiar to them as a class in such elections, . . . The answer to this contention is that preferred shareholders are preferred[2], and that the rights which protect them against dilution of their power to elect directors were given to them by *the plan of reorganization* . . ." (App. 9a).

"Defendants contend that plaintiffs are estopped . . . because Kern participated and acquiesced . . . The violation of their rights is *in contravention of* an Interstate Commerce Commission *order, the plan of reorganization, the Federal court decree,* . . ." (App. 9a).

Even the Appellate Court's final paragraph discussing the plan (App. 11a), although acknowledging that the cer-

---

[2] The Appellate Court's error in federal law is illustrated by this statement that "preferred shareholders are preferred". The reorganization plan spoke of two classes of stock, common and preferred (App. 44a-45a). But in 1940 the certificate of incorporation (approved by the bankruptcy court) provided instead for issuance of 383,000 shares of Class A stock and 343,000 shares of common stock, with no shares designated "preferred" (A. 135). When the complaint was filed in 1958 the relative positions had changed to 75,000 of Class A and 426,000 of common. The complaint called the Class A stock "preferred" (A. 3). The Appellate Court, while holding that a declaration of stockholders' rights was required, wrongly described this class of stock as "Class A preferred". Then in the quoted phrase it interpreted the word "preferred" in the plan as giving the Class A stock a special position with special rights in addition to those described in the certificate of incorporation. As said in *Guttmann* v. *I.C. R.R. Co.*, 189 F. 2d 927, 930 ((C.A. 2, 1951), by a court consisting of Circuit Judges L. Hand, Chase, and Frank,

". . . the preferred stockholders are not—like sailors or idiots or infants—wards of the judiciary".

This was said of an Illinois railroad corporation in following Mr. Justice Holmes' opinion concerning an Indiana railroad corporation in *Wabash Ry. Co.* v. *Barclay*, 280 U.S. 197 (1930).

tificate of incorporation controls, admitted that the opinion had "*given weight* to the provisions of the plan of reorganization".

The Appellate Court read into the reorganization plan the Illinois constitutional principle that staggered terms are forbidden by a requirement of cumulative voting (Pet'n. 17). The Appellate Court created and applied federal law by construing and giving effect to the federal plan of reorganization and to the ICC order and federal court decree approving the plan. The heavy weight given to these federal legal instruments tipped the scales in favor of the respondent. The federal questions, despite respondents' present disclaimers, were decisive.

4. Respondents' brief ignores and therefore concedes two facts that emphasize the need for review.

Respondents concede that the decree, in addition to forbidding staggered terms, also requires thirteen members for the railroad's board of directors unless the holders of ⅔ of the Class A stock consent to a change. An Indiana statute expressly permits a majority of the stockholders to fix the number of directors at from five to thirteen (Pet'n. pp. 14-15). The decree's flagrant disregard of this Indiana statute alone presents a substantial federal question.

Of greater practical importance is the respondents' silent admission that the decree is strongly weighted in favor of the holders of the railroad's 75,000 Class A shareholders to the detriment of the holders of 426,000 common shares (Pet'n. pp. 9, 19). The federal reorganization plan is used in the decree to extend the scope of the ⅔ vote clause of the certificate of incorporation and thereby greatly overbalance the position of the Class A stock in relation to the common stock.

CONCLUSION.

Respondents' brief fails to demonstrate that review should be denied. The federal questions presented may be subtle, but they are serious and substantial. Certiorari should be granted.

Respectfully submitted,

JAMES A. VELDE
JOHN K. NOTZ, JR.
33 South Clark Street
Chicago, Illinois 60603

PATRICK C. MULLEN
646 Chicago Road
Chicago Heights, Illinois
Counsel for Petitioners

Of Counsel
GARDNER, CARTON, DOUGLAS, CHILGREN & WAUD
33 South Clark Street
Chicago, Illinois 60603

July 1964